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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KURESE BELL,

Defendant and Appellant.

D072748

(Super. Ct. No. SCD255762)

APPEAL from a judgment of the Superior Court of San Diego County, Lorna A. Alksne, Judge. Affirmed in part; reversed in part and remanded with directions.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

Kurese Bell and Marlon Thomas committed two armed robberies. During the commission of the second robbery, an armed security guard for a medical marijuana dispensary business shot and killed Thomas. A jury convicted Bell of first degree murder (Pen. Code, §§ 187, subd. (a), 189),¹ attempted murder (§§ 187, subd. (a), 664), and two counts of robbery (§ 211). The jury also found true allegations that the attempted murder was deliberate and premeditated (§ 189), that in committing the attempted murder and robberies he personally discharged a firearm (§ 12022.53, subds. (c) & (d)), and that he committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

On appeal, Bell contends: (1) because he was 17 years old at the time of the offenses, the judgment should be reversed, or at least conditionally reversed, and the matter remanded to the juvenile court for a transfer hearing pursuant to Proposition 57; (2) the trial court erred by not instructing on voluntary and involuntary manslaughter as lesser included offenses of murder; (3) the court erred in instructing on one element of the provocative act murder doctrine and, in effect, removing that element from the jury's consideration; (4) the court erred by omitting from its instructions the requirement of a "reasonable response" killing as an element of provocative act murder; (5) the provocative act murder doctrine and jury instructions on that doctrine are void for being unconstitutionally vague; (6) the court erred by incorrectly instructing on the elements of first degree provocative act murder; (7) the cumulative prejudice from the instructional

¹ All statutory references are to the Penal Code unless otherwise specified.

errors on provocative act murder requires reversal of the judgment; (8) there is insufficient evidence to support his conviction of first degree provocative act murder; (9) the court erred by admitting hearsay expert testimony regarding the gang allegations; (10) his sentence of 15 years to life in prison for his attempted murder conviction must be reversed as an unauthorized sentence; (11) the section 12022.53 gun enhancements must be reversed and remanded for the court to exercise its discretion to strike or dismiss any or all of those enhancements under newly amended section 12022.53, subdivision (h); (12) section 654 bars his punishment for the second robbery; (13) the case should be remanded to the trial court for resentencing pursuant to *People v. Contreras* (2018) 4 Cal.5th 349 (*Contreras*); and (14) the abstract of judgment should be amended to reflect the correct total determinate sentence imposed by the court. While this appeal was pending, Bell moved for permission to file a supplemental opening brief on the questions of whether Senate Bill No. 1437 (Sen. Bill 1437), effective on January 1, 2019, applies retroactively to his case and, if so, whether Sen. Bill 1437 requires reversal of his conviction for first degree murder. We granted the motion, accepted for filing his supplemental opening brief, and requested a supplemental respondent's brief from the People and a supplemental reply brief from Bell.

Based on our reasoning *post*, we remand the matter to the trial court to conduct a resentencing hearing for the limited purpose of considering any Sen. Bill 1437 petition for relief filed by Bell and exercising its discretion under section 12022.53, subdivision (h) to strike or dismiss any or all of the section 12022.53 gun enhancements, to amend the

judgment accordingly, and to file an amended abstract of judgment reflecting, inter alia, the correct total determinate term of 33 years.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2014, Bell, then 17 years old, purchased a white Infiniti Q45. Bell's friend, J. Collins, also known as "Canine," purchased a .38 revolver and bullets after speaking with Bell and Atiim Smith earlier in the day. Collins gave the gun to Bell. On April 20, Bell told Thomas he needed thousands of dollars.

On April 21, Bell and Thomas entered the Illusions Smoke Shop. Bell, wearing a black hooded sweatshirt, a bandanna mask, and gloves, held a revolver and told Rayan J. J. (Rayan J.), the store's owner, that "[i]f you don't give me your money, I will kill you." Thomas wore a gray hooded sweatshirt, a bandanna mask, and gloves. Bell pointed the gun at Rayan J.'s head and pushed him to the floor. Bell and Thomas took cigarettes, a phone, and a laptop computer. When an employee in the restroom yelled, Bell took \$1,300 from the cash register, pointed the gun at Rayan J.'s head, and fired one shot at Rayan J., missing him. Bell and Thomas fled the scene. The store's surveillance camera recorded the robbery.²

On April 25, Bell and Thomas entered The Greener Alternative medical marijuana dispensary. Bell, wearing a black hooded sweatshirt, a bandanna mask, and gloves, pointed a gun in the face of H. Smith (Smith), the dispensary's armed security guard, who was standing near the door. Thomas wore a gray hooded sweatshirt, a bandanna mask,

² At trial, the video recording from the surveillance camera was played for the jury.

and gloves. Thomas followed Bell and gestured toward Smith, causing Smith to believe Thomas also had a gun. Bell and Thomas ordered Smith to raise his hands. Bell told him, "Don't move. Don't move. Don't fucking move." Bell pointed his gun at Smith's face and head.³ Smith raised his hands and backed into the check-in room. Bell and Thomas unsuccessfully attempted to remove Smith's gun from its holster.⁴ Smith told them to "just take the whole belt." As Thomas told Bell to "get ready," Bell pointed his gun at Smith's head. Smith believed that if he moved he would be shot in the head and killed. Bell then ordered Smith to go to a back room and lie down on the floor. Bell pointed his gun at Smith's head while he (Smith) was on the floor. Smith was afraid and thought he was going to die.

In the dispensary's sales room (i.e., the "bud room"), Thomas told Sean K., the dispensary's manager and one of its owners, to place marijuana in the bags they handed to him. Bell pointed a gun at Sean K., demanded his wallet, and ordered him to get on the floor. Sean K. heard one of the robbers say to the other: "Should I hot this dude?" Sean K. believed that was a question whether they should shoot him. When Sean K. stated that he just wanted to go home, Thomas replied: "Everything is good."

³ Smith believed that Bell was in charge because he did most of the talking and gave orders.

⁴ Smith's holster had a three-step process for removal of the gun, including a button on the inside of the holster. Smith told Bell and Thomas that he did not know how to remove the gun from the holster.

Bell told Smith several times, "Put your face on the ground. I'm going to kill you." Bell also told Smith and Sean K., "I'm going to kill you guys. I'm going to kill you both." Smith believed that both he and Sean K. were going to die regardless of what Bell and Thomas took from the dispensary. Smith heard Sean K. beg for his life in the sales room, pleading: "Please don't kill me. Please don't kill me." Bell told Thomas, "Blood. Blood. Let's go. Let's go." When Smith heard Bell and Thomas leave the sales room, Smith believed they had taken Sean K. with them and were going to kill him. Smith stood up, ran to the office, and saw his gun belt on the office floor. As Smith was pulling his gun out of its holster, Thomas entered the office and attacked him. Smith fired his gun at Thomas, killing him. Bell began firing his gun at Smith, who sustained a gunshot wound to his pelvis, fell to the floor, and returned fire. Smith crawled to the restroom, while Bell fled with about \$300 in cash and 30 jars of marijuana.⁵

Richard O., a passerby, heard the gunshots and saw Bell leave the dispensary and get in the passenger side of a white sedan. The car, driven by Atiim Smith, crashed into a wood fence as it sped away.

Later that day, Bell called his friend, Kyi R., and asked him to pick him up at his house. When Kyi R. arrived, Bell and Atiim Smith got in his car with overnight bags. Bell was crying and he and Atiim Smith expressed remorse that "this wasn't worth it." Kyi R. drove them to Atiim Smith's house and then to a hotel in the Inland Empire.

⁵ At trial, the video recording from the dispensary's surveillance camera was played for the jury.

On April 26, Bell texted Collins, stating he was going to "go on the run." Collins replied, stating that he never should have given the gun to Bell.

Police subsequently found a white car matching the description of the car that fled the scene of the April 25 robbery. It had front bumper damage that was consistent with striking a wood fence. Gloves were found inside the car that matched the gloves worn by Bell during the April 21 robbery. Inside the car's trunk, police found a bag of ammunition, a tube of gun grease bearing Collins's DNA, and latex gloves matching those worn by Thomas.

During a search of Bell's home, police found a pair of jeans with its left leg cuffed in the same manner as Bell's jeans were cuffed during the April 25 robbery. Police also found a black hooded sweatshirt with gunshot residue on it, indicating it was near a firearm when it was discharged or had touched a surface with gunshot residue on it. Both the jeans and sweatshirt had Bell's DNA on them. Bell's Twitter account included a phrase, "keepin it Piru," referring to the local Skyline Piru gang.

On May 15, police found Bell at a hotel in Buena Park. Police also found an iPad that had a video of Bell getting a bullet tattoo on May 2 and a photograph of him holding a cannister like the ones taken during the April 25 robbery. While in the patrol car, Bell asked the officers how they found him and whether he had already been identified. Bell also stated, "[Y]ou guys were on me really fast. I couldn't believe how fast you were on me." When asked if he was documented, Bell replied, "Skyline."

An amended information charged Bell with murder (§ 187, subd. (a); count 1), two counts of attempted murder (§§ 187, subd. (a), 664; counts 2 & 4), and two counts of

robbery (§ 211; counts 3 & 5). It alleged Bell was 16 years of age or older at the time of the offenses (Welf. & Inst. Code, § 707, subd. (d)(1)). It further alleged that he acted willfully and deliberately in committing count 2 (§ 189), intentionally and personally discharged a firearm in committing counts 2 and 3 (§ 12022.53, subd. (d)), committed counts 2, 3, 4 and 5 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and intentionally and personally discharged a firearm causing great bodily injury in committing counts 4 and 5 (§ 12022.53, subd. (c)).

On February 2, 2016, the jury found Bell guilty on counts 1, 2, 3, and 5, and made true findings on all of the related allegations. The jury was unable to reach a verdict on count 4, which was later dismissed on the prosecution's motion.

On November 14, Bell filed a motion for new trial, arguing that Proposition 57, which was passed by the voters on November 8, applied retroactively to his case and required reversal of his convictions and remand to the juvenile court. The trial court ruled that Proposition 57 did not apply retroactively, but authorized the prosecution to file a motion for a juvenile fitness hearing pursuant to section 1170.17, subdivision (c). The prosecution subsequently filed a motion requesting a juvenile fitness hearing. On June 30, 2017, after conducting a section 1170.17 fitness hearing, the trial court found that Bell was not fit for juvenile court.

On September 1, 2017, the court sentenced Bell to a total indeterminate term of 65 years to life in prison and a concurrent total determinate term of 33 years in prison. Bell timely filed a notice of appeal.

DISCUSSION

I

Proposition 57

Bell contends that the trial court erred by concluding Proposition 57 did not apply retroactively to his case and that the judgment should be reversed, or at least conditionally reversed, and the matter remanded to the juvenile court for a transfer hearing pursuant to Proposition 57 because he was 17 years old at the time of the instant offenses. The People agree that Proposition 57 applies retroactively to Bell's case, but argue that remand is not required because he effectively received the benefits of Proposition 57 when the trial court held a hearing on his fitness for juvenile court.

A

In November 2016, California voters passed Proposition 57 (also known as "The Public Safety and Rehabilitation Act of 2016"), which prohibits prosecutors from charging juveniles with crimes directly in adult criminal court. (*People v. Lara* (2018) 4 Cal.5th 299, 303 (*Lara*).) Under Proposition 57's provisions, prosecutors must now commence an action in juvenile court and, if they wish to try a juvenile as an adult, they must request a transfer hearing in the juvenile court to determine whether the matter should remain in the juvenile court or be transferred to adult criminal court. (*Ibid.*) Proposition 57 amended Welfare and Institutions Code section 707, subdivision (a), which now provides:

"(1) In any case in which a minor is alleged to be a person described in [Welfare and Institutions Code] Section 602 by reason of the violation, when he or she was 16 years of age or older, of any

offense listed in subdivision (b) or any other felony criminal statute, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. The motion shall be made prior to the attachment of jeopardy. Upon the motion, the juvenile court shall order the probation officer to submit a report on the behavioral patterns and social history of the minor. The report shall include any written or oral statement offered by the victim pursuant to [Welfare and Institutions Code] Section 656.2. [¶] . . . [¶]

"(3) Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E), inclusive. If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes. . . .

"(A)(i) The degree of criminal sophistication exhibited by the minor. [¶] . . . [¶]

"(B)(i) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. [¶] . . . [¶]

"(C)(i) The minor's previous delinquent history. [¶] . . . [¶]

"(D)(i) Success of previous attempts by the juvenile court to rehabilitate the minor. [¶] . . . [¶]

"(E)(i) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor. [¶] . . . [¶]"

In *Lara*, the California Supreme Court held that Proposition 57's provisions apply retroactively to "all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara, supra*, 4 Cal.5th at p. 304.) *Lara* noted that when Proposition 57 retroactively applies to a nonfinal judgment convicting a juvenile in adult criminal court, the appropriate remedy can be complex. (*Id.* at p. 313.) The court implicitly approved of the remedy provided in *People v. Vela* (2017) 11 Cal.App.5th 68

(rev. gr. July 12, 2017, S242298) (*Vela*), which remedy it believed could be implemented without undue difficulty.⁶ (*Lara*, at p. 313.) As *Lara* stated, *Vela* conditionally reversed the juvenile's conviction and sentence in adult criminal court and remanded the matter to the juvenile court to conduct a juvenile transfer hearing in accordance with Welfare and Institutions Code section 707. (*Id.* at p. 310.) *Vela* then ordered that "[w]hen conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer Vela's cause to a court of criminal jurisdiction. [Citation.] If, after conducting the juvenile transfer hearing, the court determines that it would have transferred Vela to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law," then Vela's convictions and sentence are to be reinstated. [Citation.] On the other hand, if the juvenile court finds that it would *not* have transferred Vela to a court of criminal jurisdiction, then it shall treat Vela's convictions as juvenile adjudications and impose an appropriate "disposition" within its discretion.' [Citation.]" (*Ibid.*)

B

In this case, Bell's instant offenses, the charges against him in adult criminal court, and his jury convictions on the instant offenses all occurred prior to the passage of Proposition 57 in November 2016. After Proposition 57 was passed, but before his

⁶ *Lara* also implicitly approved of the remedy provided in *People v. Cervantes* (2017) 9 Cal.App.5th 569 (rev. gr. May 17, 2017, S241323), which remedy *Lara* described as "similar to the *Vela* remedy as adapted to the precise situation." (*Lara, supra*, 4 Cal.5th at p. 313.)

sentencing, Bell filed a motion for new trial arguing that Proposition 57 applied retroactively to his case and therefore his convictions should be reversed and the matter remanded to the juvenile court. Alternatively, he argued that if the court concluded Proposition 57 only applied prospectively, the procedural aspects of section 1170.17 should nevertheless apply to his case and the court should remand the matter to the juvenile court to conduct a juvenile fitness hearing pursuant to amended section 1170.17. The prosecution opposed the new trial motion. At the hearing on the motion, the court concluded Proposition 57 did not apply retroactively, but stated that section 1170.17, subdivision (c) applied and the prosecution could request a juvenile fitness hearing thereunder if it would like Bell to be sentenced as an adult. After the prosecution stated it would file such a motion, the court stated: "That motion is going to be heard here. I sit in juvenile court all the time, so there is no reason for me to send it anywhere else. I sit in delinquency and [dependency]. Here we get sent delinquency cases for trial. The case will be heard here." The court further stated: "I'll order [the Probation Department] to complete a social study. A written social study . . . requires a recommendation [on whether that] person [is] fit and proper to be dealt with under juvenile court law." The court's minute order for that hearing states: "Probation is ordered to complete a Fitness report/Social Study." The prosecution subsequently filed a motion requesting a hearing under section 1170.17, subdivision (c).

For two days in June 2017, the court held a section 1170.17, subdivision (c) fitness hearing for Bell. The court stated the burden of proof was on the prosecution to show, by a preponderance of the evidence, that Bell was not a fit and proper subject to be dealt

with under juvenile court law. Noting that this case was procedurally unusual, the court stated that it had the option of suspending proceedings and sending the matter to the juvenile court or conducting the fitness hearing itself. The trial court chose to conduct the hearing itself, stating, "Because I regularly sit in juvenile delinquency as recently as two weeks ago and presided over a long trial there, the Court kept the fitness hearing as I regularly sit in juvenile delinquency and dependency." The prosecution stated that it intended to call Probation Officer Melissa Martinez as its last witness and noted, "I know the Court has the fitness report but [it nevertheless wanted] to go over some of the elements in that fitness report [with Martinez]."

At the hearing, the prosecution presented the testimony of Martinez and three other probation officers. Martinez testified, *inter alia*, that she had been a deputy probation officer for 12 years and was currently assigned as a juvenile investigator. Her job required her to write reports for fitness or transfer hearings. In making recommendations to the court, she generally considers the juvenile's offenses, his or her delinquent history, statements of the juvenile and his or her parents, family history, law enforcement history, school records, gang information, substance abuse issues, mental health issues, juvenile hall adjustment, adjustment to probation, and other circumstances. In writing reports and making recommendations whether a juvenile is a fit and proper subject to be dealt with by the juvenile court law, she considers five criteria: (1) the degree of criminal sophistication shown by the juvenile; (2) whether the juvenile can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; (3) his or her previous delinquent history; (4) the success of previous attempts by the juvenile court to

rehabilitate him or her; and (5) the circumstances and gravity of his or her offenses.

Martinez testified that she was assigned to write, and then wrote, a report regarding the possible transfer of Bell to criminal court. She stated the purpose of her report was to evaluate the criteria for a Welfare and Institutions Code section 707 transfer as listed on page 14 of her report.⁷ She testified that she had reviewed Bell's probation sentencing report, reviewed his law enforcement history, interviewed Bell, spoken to his mother, and reviewed relevant school and child welfare services records. Martinez testified on how each of the five criteria applied to Bell. She testified that, based on her consideration of those five criteria, it was her professional opinion that Bell was not a fit and proper subject to be dealt with in the juvenile justice system.

In addition to cross-examining each of the prosecution's witnesses, Bell's counsel presented the testimony of a psychologist who testified that Bell could be rehabilitated. He also presented the testimony of a Department of Juvenile Justice (DJJ) agent who testified that Bell was eligible for DJJ placement and, if so placed, would be returned to San Diego County by his 23rd birthday and placed on probation. Bell's counsel also noted the court could consider the statement in mitigation he had previously filed, including the exhibits thereto.

The prosecution noted that under the rules for the fitness hearing, the court could consider the evidence of Bell's crimes that it heard during the trial and the probation reports that had been submitted.

⁷ We presume that Bell's counsel had a copy of Martinez's report because he cross-examined her on her consideration of those criteria.

Following counsel's arguments, the court found that the prosecution had met its burden of proof to show that Bell was not a fit and proper subject to be dealt with under juvenile court law. In so finding, the court considered the circumstances and gravity of Bell's instant offenses, the degree of criminal sophistication that he exhibited, his previous delinquent history, the lack of success of previous attempts to rehabilitate him, and whether he could be rehabilitated prior to expiration of the juvenile court's jurisdiction. The court specifically commented on the evidence presented at trial, stating, "[W]hen I look at all the factors, the degree of criminal sophistication, I find it's well planned and it was deliberate. You brought the weapon, got the ammunition. You got bags. You got masks. You got a getaway car. You told someone to wait for you. You planned it with text messages." The court noted that Bell appeared to be the leader who directed the events and was the one who carried the gun. The court also commented that Bell had committed the instant offenses within weeks of his release from Camp Barrett, where he reportedly had done well. The court noted that Bell's criminal history began with petty thefts and escalated to a "hot prowl" burglary and then to the instant offenses. Referring to Bell's delinquent history and failed rehabilitation, the court stated, "You were given every chance." The court subsequently sentenced Bell to a total indeterminate term of 65 years to life in prison and a concurrent total determinate term of 33 years in prison.

C

Bell asserts the trial court erred by concluding Proposition 57 did not apply retroactively to his case. He argues that error requires reversal, or at least conditional

reversal, of his convictions and remand of the matter to the juvenile court for a Proposition 57 transfer hearing. The People agree the court erred by concluding that Proposition 57 did not apply retroactively to Bell's case, but argue that remand is not required because he received the benefits of Proposition 57 when the trial court held the juvenile fitness hearing under section 1170.17.

Assuming without deciding that, as the People argue, Bell forfeited his claim by not objecting to the court's section 1170.17 juvenile fitness hearing below, we nevertheless exercise our discretion to consider this issue to avoid a possible future claim of ineffective assistance of counsel. (Cf. *People v. Mattson* (1990) 50 Cal.3d 826, 854 [court considered issues not raised in trial court "to forestall a later claim that trial counsel's failure to [raise those issues] reflects constitutionally inadequate representation"]; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) In *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*), the court stated: "In general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion. [Citations.]" (*Id.* at p. 887, fn. 7.) That court noted: "The appellate courts typically have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantial right. [Citations.]" (*Ibid.*) Because the issue of whether a juvenile is entitled under Proposition 57 to a Welfare and Institutions Code section 707, subdivision (a) transfer hearing conducted by a juvenile court affects the substantial rights of that juvenile, we exercise our discretion to address the issue of whether Bell was entitled to

such a hearing even though he may not have objected to the section 1170.17 juvenile fitness hearing conducted by the adult criminal court.

Because in November 2016 when Proposition 57 became effective Bell had been convicted of the instant offenses in adult criminal court but had not yet been sentenced, there was no final judgment and therefore, under *Lara*, Proposition 57 applied retroactively to his case. (*Lara, supra*, 4 Cal.5th at p. 304.)

Like the defendant in *Vela*, Bell was originally charged and convicted in adult criminal court under then-applicable law before Proposition 57 was passed and he did not receive a transfer hearing in the juvenile court under Welfare and Institutions Code section 707, subdivision (a) before jeopardy attached. (*Vela, supra*, 11 Cal.App.5th at p. 72.) Addressing Bell's motion for new trial that argued Proposition 57 applied retroactively to his case and therefore his convictions should be reversed and the matter remanded to the juvenile court, the trial court ruled Proposition 57 was not retroactive. In so ruling, the court erred. (*Lara, supra*, 4 Cal.5th at p. 304.)

Bell argues the trial court's error in concluding that Proposition 57 did not retroactively apply to his case was prejudicial and requires reversal, or at least conditional reversal, of his convictions and remand of the matter to the juvenile court for a Proposition 57 transfer hearing. On the issue of the standard of prejudice that applies to that error, Bell does not argue, nor could he argue persuasively, that the court's error is structural error requiring reversal per se or federal constitutional error for which prejudice is determined under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). We conclude that the court's error in deciding that Proposition 57 did not apply retroactively

to Bell's case is state law error for which we determine prejudice by applying the state standard for prejudice. (Cf. *People v. Villa* (2009) 178 Cal.App.4th 443, 452-453 [trial court's failure to conduct § 1170.17, subd. (c) fitness hearing is subject to harmless error review under state standard for prejudice].) The California Constitution provides that "[n]o judgment shall be set aside . . . in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) A " 'miscarriage of justice' " should be found "only when the court . . . is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) It is the appellant's burden on appeal to affirmatively show that it is reasonably probable he or she would have obtained a more favorable result absent the claimed error. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549.) A reasonable probability is one sufficient to undermine our confidence in the outcome of the proceedings. (*In re Neely* (1993) 6 Cal.4th 901, 909.)

Applying the state standard of prejudice to the court's error in concluding Proposition 57 did not retroactively apply to Bell's case, we conclude that it is not reasonably probable Bell would have obtained a more favorable result had the court not so erred. (*Watson, supra*, 46 Cal.2d at p. 836; *In re Neely, supra*, 6 Cal.4th at p. 909.) Rather than conditionally reversing Bell's convictions and remanding the case to the juvenile court for a transfer hearing under Welfare and Institutions Code section 707, subdivision (a) (cf. *Vela, supra*, 11 Cal.App.5th at pp. 82-83), the trial court here chose to

conduct a juvenile fitness hearing under section 1170.17, subdivision (c), ordered and received a section 1170.17, subdivision (c)(2) social study, received Martinez's Welfare and Institutions Code section 707 transfer report and other evidence from the prosecution and Bell, and considered the five criteria set forth in section 1170.17, subdivision (b)(2) before concluding that Bell was not a fit and proper subject to be dealt with under juvenile court law.

In so doing, the court gave Bell the benefits of Proposition 57. As Proposition 57 intended, a judge, and not the prosecution, made the decision whether Bell was a fit and proper subject for juvenile court law or whether he should be sentenced in criminal court. By ruling that it would follow section 1170.17, subdivision (c)'s procedures, the court placed the burden on the prosecution to rebut the presumption that Bell was a fit and proper subject to be dealt with under juvenile court law.⁸ Therefore, the prosecution had, in effect, the same burden it would have had in a Proposition 57 transfer hearing to prove by a preponderance of the evidence that Bell should be transferred to a court of criminal jurisdiction.⁹ (Cal. Rules of Court, rule 5.770(a).) Furthermore, Martinez prepared a

⁸ That ruling apparently benefited Bell because, without the retroactive application of Proposition 57's amendments to Bell's case (as the trial court held), section 1170.17, subdivision (c)'s rebuttable presumption did not apply at that time to a minor convicted of first degree murder. (See § 1170.17, subd. (c); former Welf. & Inst. Code, § 707, subds. (a), (b), (c); cf. *People v. Villa*, *supra*, 178 Cal.App.4th at pp. 451-452 [§ 1170.17, subd. (c) rebuttable presumption applied because minor was not convicted of attempted murder and convicted only of offenses not listed in Welf. & Inst. Code, § 707, subd. (b)].)

⁹ Effective May 22, 2017, California Rules of Court, rule 5.770(a), was amended to provide as to Proposition 57 cases that "[i]n a transfer of jurisdiction hearing under [Welfare and Institutions Code] section 707, the burden of proving that there should be a

Welfare and Institutions Code section 707 transfer report and submitted it to the trial court. The court received that report and heard her testimony regarding that report and the five criteria as they applied to Bell. The court also received the other testimony and evidence presented by the prosecution and Bell, who was represented by counsel, including his psychologist's opinion that he could be rehabilitated. In deciding whether Bell was a fit and proper subject to be dealt with under juvenile court law, the court expressly discussed and applied the five criteria set forth in section 1170.17, subdivision (b)(2), which criteria are substantially equivalent to the five criteria set forth in Welfare and Institutions Code section 707, subdivision (a)(3), quoted *ante*.¹⁰

In general, when a trial court errs by concluding that Proposition 57 does not apply retroactively to a minor's criminal court conviction that was not yet a final judgment at the time Proposition 57 was passed, that conviction should, as in *Vela*, be conditionally reversed and the case remanded to the juvenile court for a Welfare and Institutions Code section 707 transfer hearing. (See, e.g., *Vela, supra*, 11 Cal.App.5th at p. 72.) Juvenile court judges generally should hear Welfare and Institutions Code section

transfer of jurisdiction to criminal court jurisdiction is on the petitioner, by a preponderance of the evidence."

¹⁰ Our review of the trial court's statement of reasons in support of its decision shows that it clearly and explicitly articulated its evaluative process by detailing how it weighed the evidence and by identifying the specific facts which persuaded it to reach its decision. In so doing, the court provided an adequate statement of reasons with sufficient specificity to permit meaningful review, thereby satisfying the requirements of *Kent v. United States* (1966) 383 U.S. 541, 561 and *In re Pipinos* (1982) 33 Cal.3d 189, 198. (Cf. *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009, 1035 [juvenile court's transfer decision did not permit meaningful review].)

707 transfer hearings because they have specialized training in juvenile court law (Cal. Rules of Court, standard 5.40) and are familiar with the services available to rehabilitate minors.¹¹ However, unlike Bell in this case, the minor in *Vela* did not receive a hearing that was substantially equivalent to a Welfare and Institutions Code section 707 transfer hearing, such as the section 1170.17, subdivision (c) hearing given Bell. Therefore, because this is a unique case in which the trial court, in effect, gave the minor all the substantial benefits of a Welfare and Institutions Code section 707 transfer hearing and therefore the minor suffered no state law prejudice, we conclude that the general rule requiring a conditional reversal and remand to the juvenile court as in *Vela* (for error in failing to apply Proposition 57 retroactively to a nonfinal judgment), should not, and does not, apply in this case. (Cf. *Vela*, at p. 72.)

Bell has not shown he was deprived of any substantial benefit of a Welfare and Institutions Code section 707, subdivision (a) transfer hearing by reason of the trial court conducting its substantially equivalent hearing in this case. Accordingly, he has not carried his burden on appeal to show it is reasonably probable he would have obtained a more favorable result had the trial court not erred by concluding Proposition 57 did not retroactively apply to his case. (*Watson, supra*, 46 Cal.2d at p. 836.) Because it is

¹¹ Bell merely speculates, and cites no evidence showing, that he did not receive the benefits of a Welfare and Institutions Code section 707 transfer hearing because the criminal court judge in this case was not as learned and experienced in juvenile court law as a juvenile court judge. On the contrary, the trial court judge in this case stated on the record that she regularly sat in juvenile court. Therefore, we assume the judge was trained and experienced in juvenile court law and applicable court rules and familiar with the services available to minors in juvenile delinquency proceedings as juvenile court judges generally are and reject Bell's speculation to the contrary.

reasonably probable that a juvenile court judge conducting a Welfare and Institutions Code section 707, subdivision (a) transfer hearing would have reached the same conclusion as the court conducting the section 1170.17, subdivision (c) hearing did in this case, we are confident in the outcome of the proceedings and therefore the court's error was not prejudicial.¹² (*In re Neely, supra*, 6 Cal.4th at p. 909.)

Bell cites *Lara's* discussion of section 1170.17 as support for his argument that the trial court's error was prejudicial. However, it is clear *Lara* discussed section 1170.17 only to support its conclusion that Proposition 57 applies retroactively to nonfinal judgments. (See, *Lara, supra*, 4 Cal.5th at pp. 313-314.) *Lara's* discussion does not support Bell's apparent assertion that a section 1170.17 hearing cannot be substantially equivalent to a Welfare and Institutions Code section 707, subdivision (a) transfer hearing. Here, we conclude it was.

¹² Bell also argues that certain misstatements by Martinez and other witnesses at the section 1170.17 hearing that he would be released from DJJ custody by his 23rd birthday (if he were found to be a fit and proper subject for juvenile court law) precluded the court from exercising its discretion under section 1170.17 and therefore resulted in prejudicial error. Bell cites Welfare and Institutions Code section 1800, subdivision (a), which allows the juvenile court to extend a minor's DJJ commitment when, in certain circumstances, the minor would be physically dangerous to the public. However, because that possible exceptional extension of a DJJ commitment did not make those witnesses' testimony regarding the maximum term of a minor's DJJ commitment misleading, the court could not have been misled or otherwise precluded from exercising its section 1170.17 discretion. We note that Welfare and Institutions Code section 1769, subdivision (b) has been amended since Bell's hearing and now provides that the general maximum term is until a minor is 25 years old. (See *C.S. v. Superior Court, supra*, 29 Cal.App.5th at p. 1031.)

II

Instruction on Manslaughter as a Lesser Included Offense of Murder

Bell contends the trial court erred by not instructing on voluntary and involuntary manslaughter as lesser included offenses of provocative act murder.

A

The prosecution requested an instruction on provocative act murder. Bell requested jury instructions on voluntary and involuntary manslaughter as lesser included offenses of provocative act murder. After discussion with counsel, Bell apparently conceded there was no evidence to support those instructions and the court denied his request for lack of evidence to support those theories. The court thereafter instructed the jury, *inter alia*, with CALCRIM No. 560 on provocative act murder.

B

"Under the provocative act [murder] doctrine, when the perpetrator of a crime maliciously commits an act that is likely to result in death, and the victim kills in reasonable response to that act, the perpetrator is guilty of murder. [Citation.] 'In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life.' [Citation.]" (*People v. Gonzalez* (2012) 54 Cal.4th 643, 655 (*Gonzalez*).) "A provocative act murder case necessarily involves at least three people . . . , the perpetrator of the underlying offense, an accomplice, and a victim of their crime. [Citation.] Under the provocative act murder doctrine, the perpetrator of a crime is held vicariously liable

for the killing of an accomplice committed by the third party [e.g., a victim]."¹³ (*Briscoe, supra*, 92 Cal.App.4th at p. 581.) A victim's killing of an accomplice in self-defense is not an independent intervening cause that relieves the perpetrator of liability because the killing is a reasonable response to the perpetrator's intentional provocative act. (*Ibid.*; *People v. Gilbert* (1965) 63 Cal.2d 690, 704-705 (*Gilbert*), vacated on another ground (1967) 388 U.S. 263.)

"[A] provocative act murder has both a physical and a mental element that the prosecution must establish. [Citation.] To constitute the actus reus of provocative act murder, the defendant must commit an act that provokes a third party to fire a fatal shot. The mens rea element is satisfied if the defendant knows that his or her provocative act has a high probability—not merely a foreseeable possibility—of eliciting a life-threatening response from the person who actually fires the fatal bullet." (*Briscoe, supra*, 92 Cal.App.4th at p. 582.) "The provocative act must be something beyond that necessary to commit the underlying crime." (*Id.* at p. 583.) A provocative act murder is first degree murder if it occurs during the course of a felony listed in section 189 that would support a first degree felony-murder conviction. (*Gilbert, supra*, 63 Cal.2d at p. 705.) Otherwise, it is second degree murder. (*People v. Cervantes* (2001) 26 Cal.4th 860, 874 (*Cervantes*).)

¹³ The provocative act murder doctrine therefore may apply when the felony-murder doctrine does not apply (e.g., when an accomplice is killed by a crime victim rather than by the defendant). (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 581 (*Briscoe*).)

C

"[A] trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) However, if substantial evidence would not support a finding by the jury on a lesser included offense, the court has no duty, even on a request, to instruct on that lesser offense. (*Ibid.*) Substantial evidence is evidence that a reasonable jury could find persuasive and, based thereon, find the lesser, but not the greater, offense was committed. (*Ibid.*; *People v. Williams* (2015) 61 Cal.4th 1244, 1263.) On appeal, an appellate court independently reviews the record to determine whether there is substantial evidence to support an instruction on a lesser included offense. (*People v. Trujeque* (2015) 61 Cal.4th 227, 271; *People v. Campbell* (2015) 233 Cal.App.4th 148, 158.)

D

Assuming without deciding that, as Bell asserts, voluntary manslaughter and involuntary manslaughter can be lesser included offenses of provocative act murder, we nevertheless conclude the trial court did not err by not instructing on those lesser offenses.

Voluntary manslaughter is committed when a defendant or his or her accomplice kills another person either with an intent to kill or with conscious disregard for life, but does so without malice aforethought. (*People v. Bryant* (2013) 56 Cal.4th 959, 969-970.) In particular, voluntary manslaughter includes a killing upon a sudden quarrel or heat of passion and a killing in unreasonable self-defense. (§ 192, subd. (a); *Bryant, supra*, at p.

969.) Based on our review of the record, there is no evidence to support a finding by a reasonable jury that Bell killed Thomas, there was a sudden quarrel or heat of passion, or that Smith killed Thomas in unreasonable self-defense. Alternatively stated, there is no evidence to support a finding that Bell acted with conscious disregard for life, but did so without implied malice based on his provocative act. Rather, as discussed in section VIII *post*, substantial evidence shows that Bell's provocative act or acts during the commission of the robbery supported a finding of implied malice and thus provocative act murder and not voluntary manslaughter. Therefore, the court did not err by not instructing on voluntary manslaughter as a lesser included offense of provocative act murder. (Cf. *People v. Johnson* (2013) 221 Cal.App.4th 623, 634 ["Appellant has not cited any authority supporting a theory of voluntary manslaughter where, as here, the victim of a robbery kills the defendant's accomplice in reasonable response to the intentionally committed, provocative acts of a surviving accomplice."].)

Likewise, we conclude there was no substantial evidence to support an instruction on involuntary manslaughter as a lesser included offense of provocative act murder. A killing is involuntary manslaughter if it occurs "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) Such a killing must be unintentional and without malice. (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556.) In this case, the evidence clearly showed that Thomas was killed in the course of a robbery, an unlawful act that constitutes a felony, and was not killed in the commission of a lawful act done in an unlawful manner or without due

caution and circumspection. Therefore, there is no evidence to support a finding that Bell committed involuntary manslaughter. Contrary to Bell's argument, the evidence does not support a finding that he acted merely with gross negligence, especially in light of the evidence showing he made repeated threats to kill, and pointed his gun at, Smith and Sean K.'s heads. Accordingly, the court did not err by not instructing on involuntary manslaughter as a lesser included offense of provocative act murder.

III

Instructions on Provocative Act Murder Doctrine

Bell contends the trial court erred in instructing on the provocative act murder doctrine because modified CALCRIM No. 560, as given by the court, misstated the law on one element of provocative act murder and essentially directed a verdict of guilt.

A

In discussing proposed jury instructions with counsel, the trial court stated that the prosecution needed to list the alleged provocative act or acts in CALCRIM No. 560. The prosecution proposed a modified version of CALCRIM No. 560 that included a list of Bell's alleged provocative acts. Bell did not object to that list or other portions of modified version of CALCRIM No. 560. The court subsequently instructed the jury on the provocative act murder doctrine with a modified version of CALCRIM No. 560, as follows:

"The defendant is charged in Count Three with robbery. The defendant is also charged in Count One with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.

"To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

"1. In committing or attempting to commit the robbery, the defendant intentionally did a provocative act;

"2. The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;

"3. In response to the defendant's provocative act, [Smith] killed Marlon Thomas; [¶] AND

"4. Marlon Thomas's death was the natural and probable consequence of the defendant's provocative act.

"A *provocative act* is an act:

"1. That goes beyond what is necessary to accomplish the robbery [¶] AND

"2. Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

"In order to prove that Marlon Thomas's death was the *natural and probable consequence* of the defendant's provocative act, the People must prove that:

"1. A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death;

"2. The defendant's act was a direct and substantial factor in causing Marlon Thomas's death; [¶] AND

"3. Marlon Thomas's death would not have happened if the defendant had not committed the provocative act.

"A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

"The People allege that the defendant committed the following provocative acts:

"1. The defendant aimed a gun at [Smith], an armed security guard;

"2. While aiming a gun at [Smith], the defendant held the gun in close proximity to [Smith]'s head and did so for a sustained period of time;

"3. While aiming a gun at [Smith], the defendant grabbed [Smith], kicked open a door, and directed [Smith] to the bud room, and [farther] away from the only exit to the dispensary;

"4. The defendant aimed a gun at Sean [K.];

"5. The defendant told [Smith] that he would be killed;

"6. The defendant stated, "should I hot this dude?"

"You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts. However, you do not all need to agree on which act.

"A defendant is not guilty of murder if the killing of Marlon Thomas was caused solely by the independent criminal act of someone else. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant. . . ."

Bell did not object to that instruction as given.

B

"In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) If the trial court has adequately instructed on the general principles of law, it is the defendant's obligation to request any clarifying or amplifying instructions. (*People v. Cavitt* (2004) 33 Cal.4th 187, 204 (*Cavitt*).) "[T]he failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*People v. Rundle* (2008) 43 Cal.4th 76, 151 (*Rundle*).) "[A] party may not complain on appeal that an instruction correct in law and

responsive to the evidence was too general or incomplete unless the party has requested the appropriate clarifying or amplifying language.' " (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 (*Hudson*).) On appeal, we review de novo claims of instructional error and, in so doing, consider the instructions as a whole and assume the jurors are intelligent persons who are capable of understanding and correlating all instructions given to them. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148 (*Guerra*); *People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

C

Bell argues that modified CALCRIM No. 560, as given by the trial court, instructed the jury, in effect, that its six listed alleged provocative acts were, as a matter of law, provocative acts and therefore if the jury found that Bell committed one of those listed acts, it need not make any factual determination whether he committed a provocative act. Bell argues that by removing that question of fact from the jury's deliberations, the instruction, in effect, erroneously removed one element of provocative act murder from the jury, which error requires reversal of his murder conviction.

However, as the People argue, the court's instructions, when considered as a whole, correctly instructed the jury that it must decide whether the People had proved that Bell committed a provocative act. The court's modified version of CALCRIM No. 560 instructed the jury that "the People must prove that: [¶] 1. [i]n committing or attempting to commit the robbery, the defendant intentionally did a provocative act." It further instructed on the definition of a "provocative act," stating: "A *provocative act* is an act: [¶] 1. [t]hat goes beyond what is necessary to accomplish the robbery [¶] AND

[¶] 2. [w]hose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response."¹⁴ Therefore, the foregoing language correctly instructed the jury that to find Bell guilty of murder under the provocative act doctrine, it must, inter alia, find that Bell intentionally did a provocative act in committing the robbery or attempted robbery and that the provocative act must "go[] beyond what is necessary to accomplish the robbery." (*Gonzalez, supra*, 54 Cal.4th at p. 655; *Briscoe, supra*, 92 Cal.App.4th at pp. 582-583.) Regarding the latter requirement, the court also instructed with CALCRIM No. 1600 on the offense of robbery. We reject Bell's argument that the court did not instruct the jury on *how* to determine whether his provocative act or acts went beyond that necessary to accomplish the robbery because its instruction with CALCRIM No. 1600 on the offense of robbery adequately instructed the jury on the elements of robbery (i.e., what acts were necessary to accomplish the robbery).¹⁵

¹⁴ As quoted above, modified CALCRIM No. 560, as given by the court, also instructed on the meaning of "natural and probable consequence," as that term was used in its definition of a "provocative act."

¹⁵ We reject Bell's argument that pointing a gun at the security guard or other robbery victim cannot under any circumstances constitute an act beyond that necessary to commit a robbery. For example, a robbery can be committed by means of a threat of force *without* the use of a gun. (See, e.g., *People v. White* (1995) 35 Cal.App.4th 758, 766.) None of the cases cited by Bell persuade us to reach a contrary conclusion. (See, e.g., *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 593 [dis. opn. of Mosk, J.].) We address *post* Bell's separate, but related, argument that the court's instruction on what conduct went beyond that necessary to accomplish robbery was unconstitutionally vague.

After listing six specific acts that the prosecution alleged were provocative acts committed by Bell, the court then instructed: "You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts. However, you do not all need to agree on which act." Bell asserts that language arguably instructed the jury, in effect, that each of those alleged six acts constituted provocative acts as a matter of law and that if the jury found he committed at least one of those acts, it could find him guilty of murder without deciding the question of fact whether he committed a provocative act. However, as discussed *ante*, the first part of modified CALCRIM No. 560, as given by the court, *correctly* instructed the jury that to find Bell guilty of provocative act murder, it must find, inter alia, that the prosecution proved that in committing or attempting to commit robbery, he did a provocative act and further instructed on the definition of a provocative act. When read as a whole, the court's modified CALCRIM No. 560 correctly instructed the jury that to find Bell guilty of provocative act murder, it needed to make a true finding on the question of fact on the element of whether he had committed a provocative act that went beyond that necessary to accomplish a robbery. (*Guerra, supra*, 37 Cal.4th at pp. 1148-1149.) To the extent the court's further instruction on the six listed provocative acts alleged by the prosecution was ambiguous or may have confused the jury regarding whether it needed to decide if Bell had committed a provocative act, Bell had the obligation to request a clarifying or amplifying instruction. (*Cavitt, supra*, 33 Cal.4th at p. 204.) By not requesting such a clarifying or amplifying instruction, Bell, as the People assert, forfeited any error based

on that ambiguous language.¹⁶ As quoted *ante*, "the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given." (*Rundle, supra*, 43 Cal.4th at p. 151; see also *Hudson, supra*, 38 Cal.4th at pp. 1011-1012.) Accordingly, we conclude Bell has not carried his burden on appeal to show the trial court erred by instructing with its modified version of CALCRIM No. 560.

D

Assuming, *arguendo*, that the trial court erred by instructing on provocative act murder with its modified version of CALCRIM No. 560, we nevertheless conclude that error was harmless. In particular, to the extent the court's instruction erroneously omitted an element of provocative act murder by, in effect, instructing that the six listed acts alleged by the prosecution constituted provocative acts as a matter of law, we conclude that error was harmless beyond a reasonable doubt. Although a trial court has a *sua sponte* duty to instruct the jury on the essential elements of a charged offense and the failure to so instruct on one or more (but not all) of those elements is constitutional error, the California Supreme Court held in *People v. Merritt* (2017) 2 Cal.5th 819 (*Merritt*), that such instructional error is not reversible per se, as Bell asserts, but is instead reversible unless it is harmless beyond a reasonable doubt when the error does not totally

¹⁶ Likewise, to the extent Bell argues the court's instructions were ambiguous or misleading on how the jury was to determine whether his provocative acts went beyond that necessary to accomplish the robbery, we conclude he has forfeited that claim on appeal by not requesting clarifying or amplifying instructions. (*Rundle, supra*, 43 Cal.4th at p. 151; see also *Hudson, supra*, 38 Cal.4th at pp. 1011-1012.)

vitiating the jury's findings. (*Id.* at pp. 821-822, 824, 829, 831; see also *Neder v. United States* (1999) 527 U.S. 1, 4, 11, 15 [instruction's omission of one element of charged offense was subject to harmless error standard of *Chapman, supra*, 386 U.S. 18]; *People v. Mil* (2012) 53 Cal.4th 400, 410-411 (*Mil*) [instruction's omission of two elements of charged offense was subject to harmless error review].) In *Mil*, the court stated: "Where the effect of the omission can be 'quantitatively assessed' in the context of the entire record (and does not otherwise qualify as structural error), the failure to instruct on one or more elements is mere 'trial error' and thus amenable to harmless error review."¹⁷ (*Mil*, at pp. 413-414.)

In applying that harmless error standard, "[w]e must determine whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*Merritt, supra*, 2 Cal.5th at p. 831.) Alternatively stated, we "consider whether it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict." (*Mil, supra*, 53 Cal.4th at p. 417.) We assume, *arguendo*, that the court's modified CALCRIM No. 560 instruction was ambiguous or misleading regarding whether the jury had to decide whether Bell committed a provocative act as defined in the

¹⁷ We reject Bell's assertion that the purported instructional error is prejudicial *per se* and not subject to harmless error review because it lowered the prosecution's burden to prove guilt beyond a reasonable doubt or directed a guilty verdict. *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1181-1182 [instructional error that lowers prosecution's burden of proof was structural error requiring reversal *per se*] and *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282 [instruction that results in directed verdict was structural error requiring automatic reversal], cited by Bell, did not involve the alleged omission of one or more elements of a charged offense from an instruction and are therefore factually and procedurally inapposite to this case.

instruction or merely had to decide whether he committed one of the six listed acts alleged by the prosecution. Given that assumed instructional error, we nevertheless conclude that modified CALCRIM No. 560, when considered as a whole, correctly instructed the jury on the element of a provocative act and therefore a rational jury necessarily would have understood that it was required to decide whether Bell had committed a provocative act as defined in the instruction.

Assuming *arguendo* the court's modified CALCRIM No. 560 instruction did not correctly instruct the jury on the element of a provocative act and, in effect, erroneously omitted that element from the jury's deliberations, our independent review of the record shows there is overwhelming, if not indisputable, evidence that Bell committed a provocative act, which act went beyond that necessary to accomplish a robbery. Therefore, it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent that assumed instructional error and that the assumed error did not contribute to the jury's verdict. (*Merritt, supra*, 2 Cal.5th at p. 831; *Mil, supra*, 53 Cal.4th at p. 417.)

At trial, the victims of the robbery provided unchallenged testimony regarding the incident and the jury viewed the incident on videotape. (Cf. *Merritt*, at p. 832.) That evidence showed that Bell pointed a gun at Smith's face. Bell told Smith, "Don't move. Don't move. Don't fucking move." Bell then repeatedly pointed his gun at Smith's face and head. Bell ordered Smith to go to a back room and lie down on the floor. Bell pointed a gun at Smith's head while he was on the floor. Smith thought he was going to die.

In the dispensary's sales room, Bell pointed a gun at Sean K., demanded his wallet, and ordered him to get on the floor. Sean K. heard one of the robbers say to the other, "Should I hot this dude?" Sean K. believed that was a question whether they should shoot him. Bell told Smith several times, "Put your face on the ground. I'm going to kill you." Bell also told Smith and Sean K., "I'm going to kill you guys. I'm going to kill you both." Smith believed that both he and Sean K. were going to die, regardless of what Bell and Thomas took from the dispensary. The above evidence overwhelmingly proved that Bell committed a provocative act within the meaning of the provocative act doctrine, which act went beyond that necessary to accomplish a robbery. Based on such overwhelming evidence, we conclude it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the assumed instructional error and that the error did not contribute to the jury's verdict. (*Merritt, supra*, 2 Cal.5th at p. 831; *Mil, supra*, 53 Cal.4th at p. 417.)

IV

"Reasonable Response" Killing

Bell contends the trial court erred by omitting from its instructions the requirement of a "reasonable response" killing as an element of provocative act murder. However, as we explain below, he does not cite any case persuading us that the reasonableness of the victim's response is an element of provocative act murder.

A

The court's modified version of CALCRIM No. 560 instructed the jury on the four elements of provocative act murder: "1. In committing or attempting to commit the

robbery, the defendant intentionally did a provocative act; [¶] 2. The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life; [¶] 3. In response to the defendant's provocative act, [Smith] killed Marlon Thomas; [¶] AND [¶] 4. Marlon Thomas's death was the *natural and probable consequence* of the defendant's provocative act." (Italics added.) The court instructed on the fourth element requiring that Thomas's death be the natural and probable consequence of Bell's provocative act, stating that the People must prove: "1. A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death; [¶] 2. The defendant's act was a direct and *substantial factor* in causing Marlon Thomas's death; [¶] AND [¶] 3. Marlon Thomas's death would not have happened if the defendant had not committed the provocative act." (Italics added.) The court then instructed on the meaning of the term "substantial factor," stating, "A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death." The court's instruction on provocative act murder did not require that Smith's response to Bell's alleged provocative act be reasonable.

B

The People assert, and we agree, that although earlier cases on provocative act murder included language suggesting that the victim's response to the defendant's provocative act must be reasonable, subsequent cases explained that the earlier language was simply a reference to the requirement of proximate cause, which CALCRIM No. 560 now instructs on with its "natural and probable consequence" requirement, as quoted

ante. In one of those earlier cases, *Gilbert, supra*, 63 Cal.2d 690, the Supreme Court stated:

"When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim . . . kills in *reasonable response* to such act, the defendant is guilty of murder. . . . [T]he victim's self-defensive killing . . . cannot be considered an independent intervening cause for which the defendant is not liable, for it is a *reasonable response* to the dilemma thrust upon the victim . . . by the intentional act of the defendant or his accomplice." (*Gilbert, supra*, 63 Cal.2d at pp. 704-705, italics added.)

However, in *Pizano v. Superior Court* (1978) 21 Cal.3d 128 (*Pizano*), the Supreme Court clarified *Gilbert's* "reasonable response" language, stating, "*Gilbert* does not state that the only circumstance in which a killing is attributable to the malicious act of the defendant or his accomplice is when the third person's action is a reasonable response to that act. Proximate cause problems in criminal cases cannot be solved by applying a simple rule-of-thumb applicable to every conceivable fact situation." (*Id.* at p. 138.) *Pizano* explained, "[T]he function of the reasonable response test in a *Gilbert* situation is to provide the trier of fact with a guideline for determining whether the malicious conduct rather than the underlying felony proximately caused the victim's death." (*Id.* at pp. 138-139.)

In *People v. Gardner* (1995) 37 Cal.App.4th 473 (*Gardner*), after an expansive discussion of *Gilbert*, *Pizano*, and other cases involving similar proximate cause issues, *Gardner* concluded, "Thus, as clarified in *Pizano*, the term 'reasonable response,' which the *Gilbert* court used to delineate the scope of murder liability, was simply a shorthand way of expressing the principle that the killing must, on an objective view of the facts, be

proximately caused by the acts of the defendant." (*Id.* at p. 479.) Citing *Pizano*, *Gardner* stated, "[O]ur Supreme Court has further indicated that the phrase 'reasonable response' was simply a shorthand phrase for this same determination of objective proximate cause [citation]." (*Ibid.*) *Gardner* stated that *Pizano* "found there was no requirement that the killing result from a reasonable response by the actual shooter, in order to hold the defendant liable for the murder as the proximate cause of the gun battle." (*Gardner*, at p. 480.) Accordingly, *Gardner* rejected the appellant's contention that the trial court erred by omitting the "reasonable response" language from its instructions on provocative act murder. (*Id.* at pp. 475, 480-482.)

In *Briscoe*, *supra*, 92 Cal.App.4th at pp. 592-593, the court, citing *Pizano* and *Gardner*, likewise concluded the trial court in that case committed no error in not sua sponte instructing on provocative act murder with the "reasonable response" language. (*Ibid.*) *Briscoe* stated, "Now, courts use the term 'reasonable response' as a shorthand expression of the principle that the killing must—on an objective view of the facts—be proximately caused by the defendant's acts. [Citations.] This objective approach allows the jury to find culpability—and to imply malice—based on the defendant's conduct, not on the crime victim's state of mind." (*Id.* at p. 593.)

In *People v. Mejia* (2012) 211 Cal.App.4th 586 (*Mejia*), the court, citing *Pizano*, *Gardner*, and *Briscoe*, stated, "Provocative act murder is not dependent upon the reasonableness of the actual killer's lethal response. The inquiry instead focuses simply on whether or not a surviving perpetrator committed a provocative act that *proximately* caused the killing. [Citations.] Liability for provocative act murder does *not* depend

upon the reasonableness of the actual killer's use of force; it depends upon whether the killing was a natural and probable consequence of the perpetrator's provocative act. [Citations.] More succinctly, liability for a provocative act murder depends upon the conduct of the perpetrator, not upon the mental state of the crime victim." (*Id.* at pp. 630-631.)

We agree with, and adopt, the reasoning of *Pizano*, *Gardner*, *Briscoe*, and *Mejia*, as discussed *ante*, and, based thereon, conclude the trial court in this case did *not* have a sua sponte duty, as Bell asserts, to include the "reasonable response" language in its instructions on provocative act murder. In particular, although we agree with Bell's assertion that *Pizano* did not expressly overrule *Gilbert*'s "reasonable response" language, we agree with *Gardner* that *Pizano* clarified *Gilbert* and held that a reasonable response by the victim is not required for a provocative act murder, but instead requires only that the defendant's provocative act be the proximate cause of the killing by a victim or other third party. (*Gardner*, *supra*, 37 Cal.App.4th at pp. 479-480.) Accordingly, we conclude the court correctly instructed with its modified version of CALCRIM No. 560, which required proximate causation by instructing that Thomas's death must be the natural and probable consequence of Bell's provocative act. (*Pizano*, *supra*, 21 Cal.3d at p. 138; *Gardner*, at pp. 475, 480-482; *Briscoe*, *supra*, 92 Cal.App.4th at pp. 592-593; *Mejia*, *supra*, 211 Cal.App.4th at pp. 630-631.) Bell has not carried his burden on appeal to persuade us to reach a contrary conclusion.

V

Void-for-Vagueness Constitutionality Challenge

Bell contends the provocative act murder doctrine and the trial court's jury instructions on that doctrine are void because they are unconstitutionally vague. In particular, he argues that doctrine and the court's instructions thereon are unconstitutionally vague because they do not set forth any standard to determine when a provocative act goes beyond that necessary to accomplish a robbery. However, because Bell does not show the void-for-vagueness constitutionality principle applies to the provocative act murder doctrine, which doctrine is based on case law and not statutory language, he does not carry his burden to show that doctrine is unconstitutionally vague. In any event, assuming *arguendo* that vagueness principle can apply to nonstatutory language or doctrines, we nevertheless conclude the provocative act murder doctrine and the modified version of CALCRIM No. 560, as given in this case, are not unconstitutionally vague.

A

The vagueness doctrine "bars enforcement of 'a *statute* which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " (*United States v. Lanier* (1997) 520 U.S. 259, 266, *italics added*.) The vagueness doctrine is based on "[t]he due process concept of fair warning." (*People v. Castenada* (2000) 23 Cal.4th 743, 751.) "The constitutional interest implicated in questions of *statutory* vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured

by both the federal Constitution [citation] and the California Constitution [citation].

Under both Constitutions, due process of law in this context requires two elements: a criminal *statute* must ' "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt." ' [Citations.]" (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 (*Williams*), italics added.) In reviewing a statute for vagueness, we require that the statute give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. (*Ibid.*) A vague law may trap innocent persons by not providing them with fair warning. (*Ibid.*) Furthermore, to prevent arbitrary and discriminatory enforcement, the *statute* must provide explicit standards for those who apply them. (*Ibid.*)

"The starting point of our [vagueness] analysis is 'the strong presumption that legislative enactments "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." ' [Citation.]" (*Williams, supra*, 5 Cal.4th at p. 568.) Because many statutes are ambiguous in some respects, "to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct . . . a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that 'the law is impermissibly vague *in all of its applications*.' [Citation.]" (*Evangelatos v.*

Superior Court (1988) 44 Cal.3d 1188, 1201 (*Evangelatos*).) "[C]ourts focus upon [the] defendant's act rather than hypothetical or conceivable acts falling within the statute." (*People v. McKelvey* (1991) 230 Cal.App.3d 399, 403.) "[A] statute will not be held void for vagueness at the behest of a defendant whose conduct falls clearly within its bounds." (*People v. Camillo* (1988) 198 Cal.App.3d 981, 996 (*Camillo*).)

B

Bell argues that the provocative act murder doctrine and CALCRIM No. 560, as given by the court, are unconstitutionally vague because they do not provide a sufficient standard for the jury to determine when a provocative act goes beyond the underlying felony (e.g., robbery). In particular, he argues that in this case the jury did not know whether the provocative act needed only to exceed the statutory elements of robbery or whether that act needed to exceed "the robbery" as actually committed in this case. We disagree.

Bell cites no authority showing that the void-for-vagueness constitutional principle applies to nonstatutory language or doctrines, like the case-law-derived provocative act murder doctrine. Although provocative act murder is ostensibly based on section 187, its origin and elements are not based on section 187's statutory language, but rather on the case law discussed *ante*. (See, e.g., *Gilbert, supra*, 63 Cal.2d at pp. 704-705.) Absent any persuasive authority showing that the void-for-vagueness constitutional principle applies to nonstatutory language or doctrines, Bell has not carried his burden to show that the provocative act murder doctrine and instructions thereon are void for unconstitutionally vague language. Although Bell's reply brief cites *Sheena K., supra*,

40 Cal.4th 875, which held a probation condition to be unconstitutionally vague, that case did not address the broader question of whether the void-for-vagueness constitutional principle applies to nonstatutory language or doctrines, such as the provocative act murder doctrine.

Nevertheless, assuming *arguendo* that nonstatutory language or doctrines may be subject to the constitutional prohibition against vagueness, we conclude neither the provocative act murder doctrine nor the modified version of CALCRIM No. 560, as given in this case, is void for vagueness. Under the provocative act murder doctrine, "mere participation in an armed robbery is not sufficient to invoke murder liability, direct or vicarious, when the victim resists and kills." (*In re Joe R.* (1980) 27 Cal.3d 496, 504, fn. omitted (*Joe R.*)). The killing cannot be attributable "merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life." (*Gilbert, supra*, 63 Cal.2d at p. 704.) Therefore, "the life-threatening act [i.e., provocative act] on which that liability is premised must be something beyond the underlying felony itself" (*Joe R.*, at p. 505.) For example, as in *Joe R.*, if the victim's lethal response was provoked only by acts of the perpetrator that were "already inherent in the [underlying] felony," those acts alone are insufficient for provocative act murder liability. (*Id.* at p. 508.) "One who robs another while doing no more than holding a weapon may not have committed a provocative act, while a perpetrator who brandishes a deadly weapon, puts it to the head of a robbery victim, cocks the gun or pistol-whips the victim with it may have." (*Briscoe, supra*, 92 Cal.App.4th at pp. 589-590.) Therefore, under the provocative act murder doctrine,

"[t]he provocative act must be something beyond that necessary to commit the underlying crime." (*Id.* at p. 583.) In this case, the court informed the jury of that requirement by instructing with its modified version of CALCRIM No. 560, stating: "A provocative act is an act: [¶] 1. That *goes beyond what is necessary to accomplish the robbery* [¶] AND [¶] 2. Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response." (Italics added.)

Although Bell argues that the jury did not know whether the provocative act needed only to exceed the statutory elements of robbery or whether that act needed to exceed "the robbery" as actually committed in this case and therefore the provocative act murder doctrine and the court's instructions thereon were unconstitutionally vague, we conclude that the doctrine and the instructions can be given a reasonable and practical construction so as to avoid any undue vagueness or uncertainty. (*Williams, supra*, 5 Cal.4th at p. 568.) Alternatively stated, we conclude that the provocative act murder doctrine and modified CALCRIM No. 560, as given in this case, were definite enough to provide the jury with sufficient standards for determining Bell's guilt on the murder charge. (*Id.* at p. 567.) In particular, by instructing with CALCRIM No. 560 that a provocative act must "go[] beyond what is necessary to accomplish the robbery," and by instructing with CALCRIM No. 1600 on the offense of robbery, the court adequately instructed the jury on what acts are necessary to commit the offense of robbery and, by

inference, what acts therefore go beyond those necessary to accomplish a robbery.¹⁸ Accordingly, the jury presumably understood, and in our opinion properly so, that the statutory elements test for the underlying crime of robbery applies when determining what acts committed by Bell went "beyond what is necessary to accomplish the robbery" and therefore constituted provocative acts under the provocative act murder doctrine.

"It has long been established in provocative act murder cases that when the underlying offense is robbery, any conduct beyond that essential to the commission of the robbery may be a provocative act." (*Briscoe*, *supra*, 92 Cal.App.4th at p. 587.) Contrary to Bell's apparent assertion, acts exceeding those that are inherent in a robbery offense *can* constitute provocative acts. (*Joe R.*, *supra*, 27 Cal.3d at p. 508.) However, if all of the perpetrator's acts that provoked a victim's lethal response are inherent within a robbery offense, then provocative act murder liability cannot apply. (*Ibid.*; *Briscoe*, at pp. 584, 589-590.) Bell asserts the term "the robbery" in the court's modified CALCRIM No. 560 was vague and could have misled the jury into believing that acts exceeding the statutory elements of a robbery offense could not be provocative acts if they were involved in or part of his actions while committing the robbery in this case. We disagree. We, like the court in *Briscoe*, conclude that the statutory elements test applies when determining which acts are necessary to accomplish the underlying offense (e.g., the

¹⁸ Without restating in its entirety CALCRIM No. 1600 on the offense of robbery, we note that the court instructed that the prosecution had to prove, *inter alia*, that "[t]he defendant used force or fear to take the property or to prevent the person from resisting" and that "[f]ear, as used here, means fear of injury to the person himself or herself, or injury to the person's family or property, or immediate injury to someone else present during the incident or to that person's property."

robbery committed by Bell) and that the modified version of CALCRIM No. 560, as given by the court, clearly and adequately instructed the jury on that standard for a provocative act. (*Briscoe*, at p. 587.) Accordingly, neither the provocative act murder doctrine nor the instructions on that doctrine given in this case were unconstitutionally vague. To the extent there is ambiguity in that doctrine or instructions thereon, Bell has not carried his burden on appeal to show that the doctrine is impermissibly vague in all of its applications. (*Evangelatos*, *supra*, 44 Cal.3d at p. 1201.)

Furthermore, because on this record Bell's acts clearly constituted provocative acts that went beyond those necessary to commit the underlying robbery, we cannot conclude the provocative act murder doctrine or the court's instructions thereon are void for vagueness. (*Camillo*, *supra*, 198 Cal.App.3d at p. 996.) Bell did not commit only acts of force or fear necessary to take property as required to commit a robbery offense, but also committed acts in excess of that force or fear that could have provoked Smith's lethal response. Those excessive acts included Bell's use of his gun beyond that necessary for the robbery by brandishing his gun, pointing it at the heads of Smith and Sean K., and unconditionally threatening to kill them. (Cf. *Briscoe*, at p. 587 ["A physical assault on the victim . . . is not an element of the [robbery] offense, but is an act beyond that necessary to complete a robbery."].) Because, as *Briscoe* noted, robbery "can be committed without necessarily using a gun," robbery at gunpoint may be a provocative act, especially when "a perpetrator who brandishes a deadly weapon, puts it to the head of a robbery victim, cocks the gun or pistol-whips the victim with it may have [committed a provocative act]." (*Id.* at pp. 589-590.) In this case, because there was overwhelming

evidence for the jury to find that Bell committed provocative acts in excess of those necessary to commit the robbery, we cannot conclude the provocative act murder doctrine or the court's instructions thereon are void for vagueness. (*Camillo*, at p. 996.)

VI

Instructions on First Degree Provocative Act Murder

Bell contends the court erred by incorrectly instructing on the elements of first degree provocative act murder. He argues that because the instruction used the phrase "during the commission of" a robbery instead of section 189's phrase "in the perpetration of" a robbery, a lower standard of proof applied and therefore his first degree murder conviction must be reversed.

A

In defining the offense of first degree murder, section 189 provides in pertinent part that "[a]ll murder . . . that is committed *in the perpetration of*, or attempt to perpetrate, . . . *robbery* . . . is murder of the first degree." (Italics added.)

As quoted *ante*, the court instructed with a modified version of CALCRIM No. 560 on provocative act murder. After instructing on the elements of provocative act murder, the court continued its instruction with CALCRIM No. 560 by setting forth the requirements for the jury to find Bell guilty of first degree murder, stating:

"If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.

"To prove that the defendant is guilty of first degree murder, the People must prove that:

"1. As a result of the defendant's provocative act, Marlon Thomas was killed *during the commission of a robbery*; [¶] AND

"2. Defendant intended to commit robbery when he did the provocative act.

"In deciding whether the defendant intended to commit robbery and whether the death occurred during the commission of a robbery, you should refer to the instructions I have given you on robbery.

"The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

"Any murder that does not meet these requirements for first degree murder is second degree murder." (*Italics added.*)

Bell did not object to that instruction or request any clarifying language.

B

Although, as Bell notes, the court's instruction with CALCRIM No. 560 on first degree murder did not use section 189's exact language regarding the commission of murder "in the perpetration of" robbery, but instead used the phrase "during the commission of" a robbery, that discrepancy in language is insignificant. Bell does not carry his burden on appeal to persuade us that the court's language on first degree murder allowed the jury to convict him using a lower standard of proof than that required by section 189. In *People v. Sanchez* (2001) 26 Cal.4th 834, the Supreme Court implicitly approved the use of alternative language that is equivalent to section 189's language regarding first degree murder when it stated, "[P]rovocative act implied malice murders are first degree murders when they occur *during the course of* a felony enumerated in section 189 that would support a first degree felony-murder conviction." (*Id.* at p. 852,

italics added.) By so stating, the court suggested that the phrase "during the course of" a felony (e.g., robbery) was equivalent to section 189's phrase "in the perpetration of" a felony (e.g., robbery). We discern no significant difference in meaning between the court's instruction on first degree murder using the phrase "during the commission of" a robbery and *Sanchez's* phrase "during the course of" a felony (e.g., robbery). (*Ibid.*) Accordingly, we further discern no significant difference in meaning between the court's instruction using the phrase "during the commission of" and section 189's phrase "in the perpetration of." Therefore, we conclude the court correctly instructed with its modified version of CALCRIM No. 560 on first degree murder. (§ 189; *Sanchez*, at p. 852.)

Bell does not persuade us that those two phrases are not equivalent for purposes of section 189's requirements for first degree murder. In particular, he does not cite any case authority or otherwise persuade us that section 189 requires the provocative act be committed *to achieve* a robbery rather than merely be committed *during* a robbery.¹⁹ Furthermore, Bell does not persuade us the court should have instructed on first degree murder using the phrase "in furtherance of" a robbery instead of "during the commission

¹⁹ Bell argues the provocative act must be committed to achieve the robbery so that the defendant is not found guilty of first degree provocative act murder when the act is "so outside the scope of achieving the robbery to amount to an independent intervening act unrelated to the robbery." However, Bell was convicted based on his own provocative act and not an independent act of an accomplice or third party that was outside the scope of the robbery. Furthermore, the court's instruction with CALCRIM No. 560 precluded a murder conviction when an independent intervening act by a third party occurs, stating, "A defendant is not guilty of murder if the killing of Marlon Thomas was caused solely by the independent criminal act of someone else. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant."

of" a robbery. (Cf. *People v. Johnson*, *supra*, 221 Cal.App.4th at p. 633, fn. 5 [suggesting that standard instruction on provocative act by accomplice murder be modified to require that accomplice's provocative act be "in furtherance of the common design"].) Finally, to the extent Bell complains that the court did not instruct on first degree murder using section 189's exact language or his suggested "in furtherance of" language, we conclude he forfeited that challenge by not objecting to the court's instruction and requesting that substitute or clarifying language. (*Rundle*, *supra*, 43 Cal.4th at p. 151 ["the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given"]; *People v. Covarrubias* (2016) 1 Cal.5th 838, 876-877; *Hudson*, *supra*, 38 Cal.4th at pp. 1011-1012.)

VII

Cumulative Prejudicial Instructional Error

Bell contends that the cumulative prejudice from the court's errors in instructing on provocative act murder requires reversal of his murder conviction. However, because, as we concluded above, the court did not err in instructing with its modified version of CALCRIM No. 560 on provocative act murder, there can be no cumulative prejudicial effect from the purported errors. (*People v. Anderson* (2001) 25 Cal.4th 543, 606; *People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

VIII

Substantial Evidence to Support Bell's Murder Conviction

Bell contends there is insufficient evidence to support his conviction of first degree provocative act murder. In particular, he argues there is insufficient evidence to support findings that: (1) he acted with implied malice and his acts went beyond what was necessary to accomplish the robbery; (2) Thomas's death was the natural and probable consequence of his acts and his acts were a substantial factor in causing Thomas's death; and (3) the murder was committed in perpetration of a robbery.

A

When a conviction is challenged on appeal for insufficient evidence to support it, we apply the substantial evidence standard of review. (*People v. Vines* (2011) 51 Cal.4th 830, 869; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) In so doing, we review the whole record in the light most favorable to the judgment to determine whether there is substantial evidence to support the conviction. (*Vines*, at p. 869; *Johnson*, at p. 578.) Substantial evidence is evidence that is reasonable, credible, and of solid value such that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 660.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.)

B

1. Implied malice; acts beyond those necessary for robbery.

Bell argues there is insufficient evidence to support findings that he acted with implied malice and that his acts went beyond those necessary to accomplish the robbery. In a provocative act murder case, malice is implied from the defendant's provocative act that goes beyond that necessary to commit the underlying crime (e.g., robbery).

(*Cervantes, supra*, 26 Cal.4th at p. 874; *Briscoe, supra*, 92 Cal.App.4th at p. 583.) "The mens rea element is satisfied if the defendant knows that his or her provocative act has a high probability—not merely a foreseeable possibility—of eliciting a life-threatening response from the person who actually fires the fatal bullet." (*Briscoe*, at p. 582.)

Based on our review of the evidence in the record, we conclude there is substantial evidence to support the jury's findings that Bell acted with implied malice by committing one or more provocative acts that went beyond that necessary to commit a robbery. The evidence shows that Bell did not commit only acts of force or fear necessary to take property as required to commit a robbery offense. He also committed acts in excess of that force or fear that could have provoked Smith's lethal response. In particular, Bell used his gun beyond that necessary for the robbery by brandishing his gun, pointing it at the heads of Smith and Sean K., and unconditionally threatening to kill them. Bell told Smith several times, "Put your face on the ground. I'm going to kill you." Bell also told Smith and Sean K., "I'm going to kill you guys. I'm going to kill you both." Smith believed that both he and Sean K. were going to die regardless of what Bell and Thomas took from the dispensary. (Cf. *Briscoe*, at p. 587 ["A physical assault on the victim . . . is

not an element of the [robbery] offense, but is an act beyond that necessary to complete a robbery."].) Because, as *Briscoe* noted, robbery "can be committed without necessarily using a gun," robbery at gunpoint may be a provocative act, especially when "a perpetrator who brandishes a deadly weapon, puts it to the head of a robbery victim, cocks the gun or pistol-whips the victim with it" (*Id.* at pp. 589-590.) Accordingly, there is substantial evidence to support the jury's findings that he committed one or more provocative acts (i.e., had implied malice), which acts were in excess of those necessary to commit the robbery. Furthermore, contrary to Bell's assertion, there was a high probability that the acts described above would provoke a deadly response (e.g., Smith's killing of Thomas). To the extent Bell argues his threats to kill Smith and Sean K. were only conditional or that his acts were simply acts inherent in a robbery, he misconstrues and/or misapplies the substantial evidence standard of review. *Joe R.*, *supra*, 27 Cal.3d 496, cited by Bell, is factually inapposite to this case and does not persuade us to reach a contrary conclusion.

2. Natural and probable consequence; substantial factor.

Bell argues there is insufficient evidence to support the jury's findings that the killing of Thomas was the natural and probable consequence of Bell's provocative act or acts and that act was, or those acts were, a substantial factor in causing Thomas's death. The court instructed the jury with CALCRIM No. 560, stating that the prosecution was required to prove that Thomas's death was the natural and probable consequence of Bell's provocative act or acts. The court further instructed that to prove that natural and probable consequence element, the prosecution must prove that: (1) a reasonable person

in Bell's position would have foreseen there was a high probability that his act could begin a chain of events resulting in someone's death; (2) Bell's act was a direct and substantial factor in causing Thomas's death; and (3) Thomas's death would not have happened if Bell had not committed the provocative act.

We conclude there is substantial evidence to support the jury's finding that Thomas's death was the natural and probable consequence of Bell's provocative act or acts. As discussed above, Bell brandished his gun, pointed it at the heads of Smith and Sean K., and unconditionally threatened to kill them. Smith believed that both he and Sean K. were going to die regardless of what Bell and Thomas took from the dispensary. Based on the evidence, the jury could reasonably conclude that a reasonable person in Bell's position would have foreseen that there was a high probability that his provocative act or acts could begin a chain of events resulting in someone's death (e.g., Smith shooting and killing Thomas) and that Thomas's death would not have happened if Bell had not committed the provocative act or acts.

Furthermore, there is substantial evidence to support the jury's finding that Bell's act was a direct and substantial factor in causing Thomas's death. In particular, the jury reasonably could find that Smith's acts of resistance (i.e., retrieving his gun and shooting Thomas) would not have occurred if Bell had not committed his provocative act or acts. Contrary to Bell's assertion, Smith's self-defensive killing of Thomas cannot be considered an independent intervening cause of Thomas's death for which Bell is not liable because Smith's response was reasonably foreseeable when faced with Bell's provocative act or acts. (*Gilbert, supra*, 63 Cal.2d at p. 705; *Cervantes, supra*, 26 Cal.4th

at p. 868.) As the People note, an *independent* intervening cause that relieves a defendant of criminal liability must be unforeseeable or an extraordinary and abnormal occurrence that rises to the level of an exonerating, superseding cause. (*Cervantes*, at p. 871.) In contrast, a *dependent* intervening cause does not relieve the defendant of criminal liability. (*Ibid.*) A dependent intervening cause is a normal and reasonably foreseeable result of the defendant's provocative act. (*Ibid.*) That reasonably foreseeable result of the defendant's provocative act need not have been a strong probability, but only needs to have been a possible result that might reasonably have been contemplated. (*Ibid.*) The precise result or consequence (e.g., Smith's shooting and killing Thomas) need not have been foreseen. (*Ibid.*) Rather, it is sufficient if the defendant should have foreseen the possibility of some kind of harm that might result from his or her provocative act. (*Ibid.*)

Based on the evidence in this case, the jury could reasonably find that Bell should have foreseen the possibility that some harm might result from his provocative act or acts and therefore his acts were a substantial factor in causing Thomas's death. In particular, the jury reasonably could infer that Bell should have foreseen that his brandishing of his gun, pointing it at the heads of Smith and Sean K., and unconditionally threatening them could possibly cause or result in some kind of harm. Accordingly, the jury reasonably could find that Smith's acts of resistance and self-defense were not extraordinary and abnormal occurrences that rose to the level of an exonerating, superseding cause of Thomas's death. (Cf. *Cervantes*, *supra*, 26 Cal.4th at pp. 868, 871.) To the extent Bell

argues the evidence could have, or should have, supported contrary findings by the jury, he misconstrues and/or misapplies the substantial evidence standard of review.²⁰

3. *In the perpetration of robbery.*

Bell argues there is insufficient evidence to support the jury's finding that Thomas's murder was committed in perpetration of a robbery and thus its finding that Bell was guilty of first degree murder. Apparently relying on his argument discussed in section VI *ante*, Bell argues that although there may have been substantial evidence to support a finding that the murder occurred "during the commission of" a robbery under the court's instructions, there was insufficient evidence that the murder occurred "in the perpetration of" a robbery. However, we rejected *ante* his argument that those two phrases are significantly different for purposes of first degree provocative act murder. Based on the evidence in this case, the jury could reasonably conclude that Bell's provocative acts and Smith's self-defensive act of killing Thomas occurred during the commission of the robbery, which we have concluded is equivalent to occurring in the perpetration of the robbery. Contrary to Bell's apparent assertion, for Bell to be convicted of first degree murder Smith's killing of Thomas need not have been intended to further the robbery. Bell does not cite any case or other authority persuading us otherwise. Accordingly, we conclude there is substantial evidence to support the jury's finding that Bell is guilty of first degree provocative act murder.

²⁰ In particular, by arguing that Bell and Thomas's initial acts in committing the robbery set in motion the chain of events that led to Thomas's death, Bell misconstrues and/or misapplies the applicable substantial evidence standard of review.

IX

Gang Expert Testimony

Bell contends the trial court erred by admitting hearsay expert testimony regarding the gang allegations. Citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), he argues Detective Amalia Sidhu was improperly allowed to testify as an expert witness regarding predicate offenses committed by members of the Eastside Skyline Piru gang, which predicate offenses were necessary to prove the section 186.22 gang allegations.

A

Before trial, Bell opposed the prosecution's motion in limine for admission of testimonial hearsay statements through gang experts to the extent the experts implicitly or explicitly endorsed such hearsay statements, arguing that hearsay evidence would violate the California and United States Constitutions. The court noted that the issue was pending before the California Supreme Court. The prosecution stated that a safer approach would be to allow its gang expert to relate that she had conversations with gang members that supported her opinion, but without testifying regarding those specific conversations. The court ruled that the prosecution's gang expert could rely on hearsay, but could not testify regarding exact hearsay statements.

At trial, Sidhu testified, inter alia, that three predicate offenses were committed by Eastside Skyline Piru gang members and that those offenses constituted a pattern of criminal activity. In particular, she testified that gang member Antuon Grey was convicted of first degree murder with gang allegations, gang member George Austin was convicted of robbery, assault with a deadly weapon, and assault likely to cause great

bodily injury, all with gang allegations, and gang member Reality Grayson was convicted for unlawfully driving and taking a vehicle with a gang allegation. In so doing, Sidhu briefly described the underlying facts of each of those predicate offenses. Her testimony was based on her review of police investigation reports, charging documents, and court exhibits 18, 19, and 20. Those three exhibits were subsequently admitted in evidence without any objection by Bell. After the court instructed the jury on the gang allegations, the jury found true all of the gang allegations.

Following Bell's convictions and the true findings on gang allegations, the California Supreme Court issued its opinion in *Sanchez, supra*, 63 Cal.4th 665. Bell thereafter filed a motion for new trial, arguing that Sidhu's gang expert testimony violated *Sanchez*. The prosecution opposed the motion, arguing that *Sanchez* was inapplicable because Sidhu testified only regarding the pattern of criminal activity and not case-specific evidence. It further argued that the predicate offenses were also proved through admission of exhibits certifying the gang members' prior convictions and Sidhu simply presented some context for those exhibits, thereby making any error harmless. Bell's counsel subsequently withdrew his new trial motion to the extent it challenged the admission of gang expert testimony in violation of *Sanchez*.²¹ The court sentenced Bell to a total indeterminate term of 65 years to life in prison, which term included punishment for the gang allegations, and a concurrent total determinate term of 33 years in prison.

²¹ Accordingly, Bell's motion for new trial raised only the issue of the retroactive application of Proposition 57, as discussed *ante*.

B

Section 186.22, subdivision (a) provides:

"Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished"

Section 186.22, subdivision (e) defines the phrase "pattern of criminal gang activity" as meaning "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [list of 33 qualifying offenses]." Alternatively stated, to prove such a gang allegation, the prosecution must show that "the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting *two or more* of

the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period." (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the admission of testimonial hearsay violates the Confrontation Clause of the Sixth Amendment unless the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant. (*Id.* at pp. 53-54, 59.) In *Sanchez*, the California Supreme Court addressed the question of "the degree to which the *Crawford* rule limits an expert witness from relating case-specific hearsay content in explaining the basis for his opinion." (*Sanchez, supra*, 63 Cal.4th at p. 670.) *Sanchez* held that "case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law." (*Ibid.*) The court stated an "expert is generally not permitted . . . to supply case-specific facts about which he has no personal knowledge." (*Id.* at p. 676.) Importantly for this case, *Sanchez* stated, "Case-specific facts are those relating to the particular events and participants alleged to have been involved *in the case being tried*." (*Ibid.*, italics added.) In the circumstances of *Sanchez*, the court concluded that the expert's "background testimony about general gang behavior or descriptions of the . . . gang's conduct and its territory" was relevant and admissible regarding the gang's history and general operations. (*Id.* at p. 698.)

In *People v. Meraz* (2016) 6 Cal.App.5th 1162, review granted March 22, 2017, S239442 (*Meraz*),²² the court construed *Sanchez's* holding as permitting the expert in that case to testify regarding "the general background . . . about [the gang's] operations, primary activities, and *pattern of criminal activities*, which was unrelated to defendants or the current shooting." (*Id.* at p. 1175, italics added.) *Meraz* stated, "Thus, under state law after *Sanchez*, [the expert] was permitted to testify to non-case-specific general background information about [the gang], its rivalry with [another gang], its primary activities, and *its pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers.*" (*Ibid.*, italics added.) *Meraz* also noted that "[t]he certified records of the convictions of other gang members also were not testimonial under *Crawford*. [Citation.]" (*Id.* at p. 1176, fn. 10, citing *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 ["documents showing 'acts and events relating to convictions and imprisonments' are not testimonial under the confrontation clause].")

C

Bell argues the trial court erred by admitting Sidhu's expert testimony regarding the three predicate offenses committed by Eastside Skyline Piru gang members (i.e., Grey, Austin, and Grayson) and that those offenses constituted a pattern of criminal activity. In particular, he argues that expert testimony violated *Sanchez's* holding because Sidhu's testimony on the gang's predicate offenses was case-specific hearsay evidence

²² Although the California Supreme Court granted review in *Meraz*, it ordered that the Court of Appeal's opinion in *Meraz* "remain precedential," citing California Rules of Court, rule 8.1115(e)(3). (*People v. Meraz* (2017) 215 Cal.Rptr.3d 3, 390 P.3d 782.)

that related to the particular events and participants alleged to have been involved in the instant case. We disagree. *Sanchez* allows a gang expert to testify regarding general background information relating to a gang's history, conduct, and general operations based on hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 698.) We conclude the predicate offenses to which Sidhu testified in this case do *not* relate to the particular events and participants in the instant case. (*Id.* at p. 676.) Rather, those predicate offenses are historical facts related to the gang's past conduct and activities, which facts relate to the gang as an organization and are *not* specific to the instant case (i.e., Bell and the instant offenses). Alternatively stated, Sidhu's expert testimony showed that the Eastside Skyline Piru gang had engaged in a "pattern of criminal gang activity" and was therefore a criminal street gang under section 186.22 regardless of the events and participants of the instant case. Accordingly, the facts of the predicate offenses to which Sidhu testified constituted background information that was relevant and admissible to show the past conduct of the gang and its history and general operations. (*Id.* at p. 698; *Meraz, supra*, 6 Cal.App.5th at p. 1175 [expert testimony on gang's pattern of criminal activities was "unrelated to defendants or the current shooting" and therefore was not case-specific hearsay evidence in violation of *Sanchez*].)

Meraz stated that *Sanchez* allows gang expert testimony regarding a gang's "pattern of criminal activity, even if it was based on hearsay sources like gang members and gang officers." (*Meraz, supra*, 6 Cal.App.5th at p. 1175.) Contrary to Bell's assertion, Sidhu's expert testimony on the gang's pattern of criminal activity was *not* regarding a particular event or participants involved in this case. In particular, we reject

his assertion that Grey, Austin, and/or Grayson, as the gang members who committed the predicate offenses, are "participants . . . involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) We conclude that because Sidhu's expert testimony on the Eastside Skyline Piru gang's predicate offenses, which testimony was based, in part, on hearsay evidence, did not pertain to "[c]ase-specific facts . . . relating to the particular events and participants alleged to have been involved in the case being tried," that expert testimony did not violate *Sanchez* and therefore the trial court did not err by admitting that testimony. (*Ibid.*) Bell has not carried his burden on appeal to show admission of that expert testimony violated *Sanchez*, *Crawford*, or his Sixth Amendment right of confrontation.

D

Assuming arguendo that the court erred by admitting Sidhu's expert testimony on the gang's pattern of criminal activity in violation of *Sanchez* or Bell's Sixth Amendment right of confrontation, we nevertheless conclude that error was harmless. As the People note, Bell admitted being a member of the Eastside Skyline Piru gang. One of Bell's defense witnesses, Reginal W., testified he was a member of that gang and had witnessed burglaries, assaults, and attempted murders in association with that gang. Also, official records showing the convictions of Grey, Austin, and/or Grayson for the predicate offenses to which Sidhu testified were admitted in evidence without any objection by Bell. Based on the overwhelming evidence, other than Sidhu's expert testimony, that the Eastside Skyline Piru gang had a pattern of criminal activity and applying the federal constitutional standard of prejudice, we conclude beyond a reasonable doubt that the

assumed error did not contribute to the jury's verdict. (*Chapman, supra*, 386 U.S. at p. 24; *Mil, supra*, 53 Cal.4th at p. 417.) Applying the state law standard of prejudice, we conclude based on the overwhelming evidence of the gang's pattern of criminal activity that it is not reasonably probable that Bell would have obtained a more favorable result had Sidhu's expert testimony on that issue been excluded. (*Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, assuming the court erred by admitting Sidhu's testimony on that issue, that error was harmless and does not require reversal of any part of the judgment (e.g., true findings on the gang allegations).

X

15 Years to Life Sentence for Attempted Premeditated Murder

Bell contends his sentence of 15 years to life in prison for his attempted premeditated murder conviction must be reversed as an unauthorized sentence. In particular, he argues that because section 664, subdivision (a) provides an enhanced sentence of life with the possibility of parole for attempted murder that is premeditated, the trial court's imposition of an additional enhancement pursuant to section 186.22, subdivision (b)(5), precluding the possibility of parole until after he has served 15 years in prison, is unauthorized and must be stricken.

A

The jury found Bell guilty on count 2 of the attempted murder of Smith and further found that offense was willful, deliberate, and premeditated within the meaning of section 189. It also found that Bell committed that offense for the benefit of, or at the direction of, or in association with a criminal street gang and with the specific intent to

promote, further, and assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1). The court sentenced Bell to a consecutive term of 15 years to life with the possibility of parole for count 2 pursuant to sections 664, subdivision (a) and 186.22, subdivisions (b)(1) and (b)(5).

B

The offense of attempted murder is not divided into separate degrees. (*People v. Bright* (1996) 12 Cal.4th 652, 665-669 (*Bright*).) "[A]n attempt to commit murder that is 'willful, deliberate, and premeditated' does not establish a greater degree of attempted murder but, rather, sets forth a penalty provision prescribing an increased sentence (a greater base term) to be imposed upon a defendant's conviction of attempted murder when the additional specified circumstances are found true by the trier of fact." (*Id.* at p. 669, fn. omitted.) Section 664 sets forth the punishments for various attempted offenses, stating:

"Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

"(a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, *if the crime attempted is willful, deliberate, and premeditated murder*, as defined in Section 189, *the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole*. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine

years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact. . . ." (Italics added.)

Under section 190, subdivision (a), the offense of murder without premeditation (or other circumstance raising the offense to first degree murder) shall be punished by a prison term of 15 years to life, while the offense of premeditated murder shall be punished by death, a prison term of life without the possibility of parole, or a prison term of 25 years to life. (§§ 189, 190, subd. (a).) Accordingly, under section 664, subdivision (a), attempted murder without premeditation is punished by a prison term of either five, seven, or nine years, while attempted murder with premeditation is punished by a prison term of life with the possibility of parole. (§ 664, subd. (a); *People v. Seel* (2004) 34 Cal.4th 535, 540-541.)

Section 186.22, subdivision (b) provides for enhanced sentencing when a person "is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).) In particular, section 186.22, subdivision (b)(5) provides that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

We decide de novo the question of law whether a sentence is authorized. (*People v. Camp* (2015) 233 Cal.App.4th 461, 467.)

C

Bell argues that because the prescribed sentence for attempted murder is a prison term of five, seven, or nine years in prison and that sentence is enhanced to a term of life with the possibility of parole when the attempted murder is premeditated, section 186.22, subdivision (b)(5)'s enhancement does not apply because the underlying offense of attempted murder is punished only by a prison term of five, seven, or nine years. We disagree. Although Bell was convicted on count 2 of attempted murder, that offense was punished pursuant to section 664, subdivision (a) by a term of life with the possibility of parole because the jury found he attempted to commit murder with premeditation. As the People argue, section 664, subdivision (a) provides an alternative sentence for attempted murder when that offense is committed with premeditation. Contrary to Bell's assertion, section 664, subdivision (a) is *not* an enhancement statute that provides for punishment in addition to that prescribed by statute for an offense when a qualifying circumstance is present. Alternatively stated, we reject his assertion that the additional finding that he committed the attempted murder *with* premeditation requires an "enhancement" of the prison term otherwise applicable for attempted murder (i.e., five, seven, or nine years) by increasing the sentence to life with the possibility of parole. We conclude that rather than providing an enhancement, section 664, subdivision (a) provides an alternative sentence when the offense is an attempt to commit premeditated murder.

In *People v. Villegas* (2001) 92 Cal.App.4th 1217, the court held that the defendant, who was convicted of attempted premeditated murder, was correctly sentenced to a term of life with the possibility of parole pursuant to section 664,

subdivision (a), with a minimum parole eligibility of 15 years pursuant to section 186.22, subdivision (b)(5) based on the true finding on the criminal street gang allegation. (*Id.* at pp. 1228-1229.) In *People v. Montes* (2003) 31 Cal.4th 350, the California Supreme Court, while addressing punishment for attempted murder without premeditation, expressed no opinion on punishment for attempted murder with premeditation, but, citing *Villegas*, noted that "where the defendant is convicted of attempted murder with premeditation[.]" section 186.22, subdivision (b)(5) "raises the seven-year minimum eligible parole date . . . to a 15-year minimum eligible parole date. [Citation.]"²³ (*Id.* at p. 361, fn. 14.)

Likewise, *People v. Jones* (2009) 47 Cal.4th 566 noted that certain statutes (e.g., § 186.22, subd. (b)(4)) merely set forth an alternate penalty for the underlying felony rather than providing a sentence enhancement as punishment in addition to the base term imposed for a felony. (*Id.* at p. 578.) *Jones* stated, "The difference between the two is subtle but significant. 'Unlike an enhancement, which provides for an *additional term* of imprisonment, [a penalty provision] sets forth an alternate penalty *for the underlying felony itself*, when the jury has determined that the defendant has satisfied the conditions specified in the statute.' [Citation.] (*Ibid.*) Furthermore, as quoted *ante*, *Bright* stated: "[A]n attempt to commit murder that is 'willful, deliberate, and premeditated' . . . sets

²³ To the extent Bell relies on *Montes* for his assertion that the offense of attempted murder is not a felony punishable by imprisonment for life, he misconstrues the language in *Montes* and disregards the fact that *Montes* involved a conviction of attempted murder *without* premeditation and is therefore factually inapposite to this case. (*Montes, supra*, 31 Cal.4th at p. 352.) Accordingly, *Montes* does not support his assertion.

forth a penalty provision prescribing an increased sentence (a greater base term) to be imposed upon a defendant's conviction of attempted murder when the additional specified circumstances are found true by the trier of fact." (*Bright, supra*, 12 Cal.4th at p. 669, fn. omitted.) Accordingly, *Villegas, Montes, Jones*, and *Bright* support our construction of section 664, subdivision (a) as providing an alternate penalty for the offense of attempted murder when committed with premeditation. Therefore, the court's imposition of the section 186.22, subdivision (b)(5) enhancement for count 2 is not an unauthorized sentence. *Gonzalez, supra*, 54 Cal.4th 643, cited by Bell, is inapposite to this case and does not persuade us to reach a contrary conclusion.²⁴

XI

Section 12022.53 Enhancements

Bell contends the three section 12022.53 gun enhancements imposed by the court must be reversed and remanded for the court to exercise its discretion under newly amended section 12022.53, subdivision (h), to strike those enhancements. We agree.

A

On September 21, 2017, Bell was sentenced. In addition to the punishment otherwise imposed for count 2 (attempted murder), the court imposed an additional consecutive term of 25 years to life for the jury's true finding on the related section

²⁴ In *Gonzalez, supra*, 54 Cal.4th at page 654, the court stated in dictum that the sentence for attempted murder "can be enhanced if the attempt to kill was committed with premeditation and deliberation." However, because the issue of whether section 664, subdivision (a) is an enhancement statute was not before the court, we decline to follow that dictum and instead conclude section 664, subdivision (a) merely provides an alternative sentence when a defendant attempts to murder a person with premeditation.

12022.53, subdivision (d) gun enhancement. In addition to the punishment otherwise imposed for count 3 (robbery), the court imposed an additional consecutive term of 25 years to life for the jury's true finding on the related section 12022.53, subdivision (d) gun enhancement, but stayed execution of that enhancement pursuant to section 654. In addition to the punishment otherwise imposed for count 5 (robbery), the court imposed an additional consecutive term of 20 years for the jury's true finding on the related section 12022.53, subdivision (c) gun enhancement.

B

At the time of Bell's sentencing (i.e., September 21, 2017), section 12022.53, subdivision (h) stated, "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h).) However, on October 11, 2017, after Bell's sentencing, Senate Bill No. 620 was signed by the Governor, amending section 12022.53, subdivision (h), as of January 1, 2018, to read as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

In *People v. Chavez* (2018) 22 Cal.App.5th 663 (*Chavez*), we addressed the question of whether newly amended section 12022.53, subdivision (h) applied retroactively to nonfinal judgments. After discussing *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*) and related cases, we concluded that "*Francis* is controlling authority and

requires the retroactive application of amended section 12022.53, subdivision (h) to all nonfinal judgments. [Citations.]" (*Chavez*, at p. 712.) Because the record in that case "[did] not clearly indicate the trial court would have declined to strike or dismiss the section 12022.53, subdivision ([d]) firearm enhancement if it had the discretion to do so at the time of [the defendant's] sentencing," we concluded that the appropriate remedy was to remand the matter for resentencing to allow the trial court to consider whether to exercise its section 12022.53, subdivision (h) discretion to strike that firearm enhancement. (*Chavez*, at pp. 713-714.)

C

Bell asserts, and the People concede, that newly amended section 12022.53, subdivision (h) should be applied retroactively to his nonfinal judgment. Following our decision in *Chavez*, we conclude amended section 12022.53, subdivision (h) applies retroactively to the nonfinal judgment in this case. (*Chavez, supra*, 22 Cal.App.5th at p. 712.)

Given section 12022.53, subdivision (h)'s retroactive application to his nonfinal judgment, Bell argues that we should remand the matter to the trial court to allow it to consider exercising that discretion. However, the People argue that we need not remand the matter for resentencing because "the record indicates that the trial court would not [exercise its section 12022.53, subdivision (h) discretion] even if given the opportunity." We agree with Bell's argument.

Based on our review of the record in this case, we conclude, as we did in *Chavez*, that "the record does not clearly indicate the trial court would have declined to strike or

dismiss" the section 12022.53 gun enhancements if it had the discretion to do so at the time of Bell's sentencing. (*Chavez, supra*, 22 Cal.App.5th at p. 713.) The probation department recommended that Bell be sentenced to a total determinate term of 39 years 4 months and a total indeterminate term of 65 years to life in prison. In particular, it recommended an upper term of five years for count 5 (before the two related enhancements were added). It also recommended that Bell receive consecutive sentences for all counts. The prosecution requested that Bell be sentenced to a total determinate term of 26 years and a total indeterminate term of 90 years to life in prison. In particular, the prosecution requested that Bell receive an upper term of five years for count 3 (before the two related enhancements were added). The prosecution also requested that Bell receive consecutive sentences for all counts. At Bell's sentencing, after describing the egregious and violent actions taken by Bell in committing the instant offenses and his lack of remorse thereafter, the court stated, "I do think what the [P]eople were asking for and what [the probation department] was asking for . . . was excessive in light of Mr. Bell's age. I'm . . . exercising my discretion." The court then imposed a total indeterminate term of 65 years to life and concurrent determinate terms of three years for count 3 and 10 years for its gang enhancement; and three years for count 5, 10 years for its gang enhancement, and 20 years for its gun enhancement.²⁵

²⁵ The court also imposed a term of 25 years to life in prison for the section 12022.53, subdivision (d) enhancement related to count 3, but stayed its execution pursuant to section 654.

By making the determinate terms it imposed for counts 3 and 5 and their related enhancements *concurrent* rather than consecutive, the court rejected the recommendations of the probation department and the prosecution for consecutive terms and instead exercised its discretion to impose punishment on Bell less than the maximum allowable by virtue of his convictions. Furthermore, the court rejected the probation department's recommendation that it impose a five-year term for count 5 and the prosecution's recommendation that it impose a five-year term for count 3, imposing concurrent middle three-year terms for both counts, which terms were less than the maximum five-year terms it could have imposed for those robbery offenses. Because the court exercised its discretion to not impose the maximum sentence allowed under the law and the record does not contain any statement by the court indicating that it would have imposed the section 12022.53 gun enhancements even if it had the discretion to strike or dismiss them, the record does not clearly indicate that the court would have declined to strike or dismiss the section 12022.53 gun enhancements if it had the discretion to do so at the time of Bell's sentencing. (*Chavez, supra*, 22 Cal.App.5th at p. 713.) Absent such a clear indication, the appropriate remedy is to remand for resentencing to allow the court to consider whether to exercise its discretion under section 12022.53, subdivision (h) to strike or dismiss any or all of the section 12022.53 gun enhancements under section 1385. (*Id.* at p. 714.) We express no opinion regarding how the trial court should exercise its discretion under section 12022.53, subdivision (h).

XII

Section 654

Bell contends section 654 bars his punishment for the April 25, 2014 robbery (count 3) because robbery was an essential element of the underlying provocative act murder and the first degree murder finding (count 1). He also contends section 654 bars his punishment for the attempted murder (count 2) and robbery (count 3) because those offenses occurred during the robbery for purposes of retaining the stolen property.

A

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." Accordingly, section 654 " "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor." " " (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*)). If all of the offenses are incidental to a single objective, the court may punish the defendant for only one of them. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Nevertheless, even though a defendant may have had a single objective during an indivisible course of conduct, the multiple victim exception to section 654 allows punishment of that defendant if he or she engaged in violent conduct that injured several victims. (*People v. Champion* (1995) 9 Cal.4th 879, 935; *People v. Garcia* (1995) 32

Cal.App.4th 1756, 1781.) In particular, "[r]obbery is violent conduct warranting separate punishment for the injury inflicted on each robbery victim." (*Champion*, at p. 935.)

The determination of whether section 654 applies to multiple offenses committed by a defendant is a factual question for the trial court. (*Jones, supra*, 103 Cal.App.4th at p. 1143.) On appeal, we review the trial court's ruling on section 654's applicability for substantial evidence to support its express or implied findings. (*Ibid.*) In so doing, we presume the existence of every fact the court could reasonably infer from the evidence. (*Ibid.*)

B

As the People assert, the multiple victim exception to section 654 applies in this case to support the imposition and execution of the court's sentences for counts 2 and 3. In particular, there is substantial evidence to support a finding by the court that Sean K. was the victim of the count 3 robbery. While in the dispensary's sales room, Thomas told Sean K. to place marijuana in the bags he and Bell had handed to him. Bell pointed a gun at Sean K., demanded his wallet, and ordered him to get on the floor. Accordingly, there is overwhelming evidence showing that Sean K. was the victim of a robbery and, based thereon, the court could reasonably find that Sean K. was the victim of the robbery charged in count 3 even though neither the information nor the verdict form identified a particular victim for count 3. "Ordinarily, in determining whether . . . section 654 applies, the trial court is entitled to make any necessary factual findings not already made by the jury." (*People v. Centers* (1999) 73 Cal.App.4th 84, 101 (*Centers*) [rejecting § 654 challenge to punishment for both burglary and kidnapping convictions].) In

Centers, the court concluded that "the trial court could properly find multiple victims even though the information did not specify, and the jury did not make any finding regarding, the identity of any victim of the burglary or the personal firearm use." (*Id.* at p. 101.) *Centers* concluded the trial court's implied finding of multiple victims was supported by substantial evidence and therefore section 654 did not preclude separate punishment for the defendant's burglary and kidnapping convictions. (*Id.* at pp. 101-102.) Accordingly, neither the information nor the jury's verdict must identify the victims for the trial court to apply the multiple victim exception to section 654.²⁶ (*Id.* at p. 101; *People v. Deegan* (2016) 247 Cal.App.4th 532, 545 ["courts have held that 'in the absence of some circumstance "foreclosing" its sentencing discretion . . . , a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial, without regard to the verdicts' "].) Contrary to Bell's assertion, the multiple victim exception can therefore apply even though the information, jury instructions, and verdicts did not identify a particular victim for the count 3 robbery. Therefore, the trial court did not err by making, and substantial evidence supports, its implied finding that the multiple

²⁶ We reject Bell's attempt to distinguish *Centers* because burglary does not require a specific victim. In *Centers*, the defendant personally used a firearm in the commission of the burglary and therefore the court considered that offense to be a violent one for purposes of the multiple victim exception to section 654. (*Centers, supra*, 73 Cal.App.4th at pp. 100-101.) Accordingly, we conclude *Centers* is analogous and supports our conclusion that the multiple victim exception to section 654 applies in this case. We likewise reject Bell's assertion that application of the multiple victim exception in this case would violate his due process right to have the jury determine his guilt on each charged offense. By impliedly finding that Sean K. was the victim of the count 3 robbery and sentencing him to separate punishment on that count, the court did not deprive the jury of its finding of guilt thereon, but merely found that his punishment should not be reduced under a particular sentencing statute (i.e., § 654).

victim exception to section 654 applied to allow multiple punishment for counts 1, 2 and 3. *People v. Hensley* (2014) 59 Cal.4th 788, cited by Bell, did not address the multiple victim exception to section 654 and therefore is inapposite and does not persuade us to reach a contrary conclusion.

XIII

Contreras

Bell contends the case should be remanded to the trial court for resentencing pursuant to *Contreras, supra*, 4 Cal.5th 349. He concedes that his case appears to fall within the holding of *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) because he is entitled to a youth offender parole hearing after 25 years in prison. Nevertheless, he argues that *Contreras* may require an earlier parole hearing and therefore we should remand the matter to allow him to demonstrate his maturity and rehabilitation and obtain an earlier parole hearing date.

A

In *Franklin, supra*, 63 Cal.4th 261, the juvenile defendant was convicted of first degree murder with a personal firearm-discharge enhancement and sentenced to a mandatory term of life in prison with the possibility of parole after 50 years. (*Id.* at pp. 268, 280.) On appeal, he claimed that his sentence violated the holding in *Miller v. Alabama* (2012) 567 U.S. 460 because his sentence was the functional equivalent of a sentence of life without the possibility of parole and therefore violated the Eighth Amendment of the federal Constitution. (*Franklin*, at pp. 273, 280.) *Franklin* held that because the defendant was entitled to a youth offender parole hearing after 25 years in

prison under newly enacted section 3051, his sentence was not the functional equivalent of life in prison without the possibility of parole and therefore did not violate *Miller's* holding. (*Id.* at pp. 268, 279-280.) In particular, the court held that under section 3051 and related statutes the defendant had "a meaningful opportunity for release during his 25th year of incarceration." (*Id.* at pp. 279-280.)

In *Contreras, supra*, 4 Cal.5th 349, the two juvenile defendants were convicted of kidnapping and sexual offenses and sentenced under the One Strike law to terms of 50 years to life and 58 years to life, respectively. (*Id.* at p. 356.) *Contreras* addressed the question of whether their sentences violated the Eighth Amendment. (*Id.* at pp. 356, 359-360.) The court stated that because juveniles convicted under the One Strike law are not entitled to a youth offender parole hearing, the defendants were not entitled to a section 3051 parole hearing and therefore *Franklin's* holding, as discussed above, did not apply. (*Id.* at p. 359.) *Contreras* stated that because the juvenile defendants committed nonhomicide offenses, the Eighth Amendment precluded sentences of life in prison without the possibility of parole and they "must have 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' [Citation.]" (*Id.* at p. 360, citing *Graham v. Florida* (2010) 560 U.S. 48, 75 (*Graham*).) The court concluded that under *Graham* "the parole eligibility date of a lengthy sentence [must] offer[] a juvenile offender a realistic hope of release and a genuine opportunity to reintegrate into society." (*Contreras*, at p. 373.) *Contreras* held that the sentences imposed on the juvenile defendants for nonhomicide offenses under the One Strike law were unconstitutional under *Graham*. (*Id.* at p. 356.)

B

Bell asserts that even though his case apparently complies with *Franklin*, we should nevertheless remand his case to the trial court for resentencing in light of *Contreras*. We agree that Bell's sentence complies with *Franklin* because he is entitled to a section 3051 youth offender parole hearing after he has served 25 years in prison. Section 3051, subdivision (b)(3) provides: "A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."²⁷ Therefore, although Bell was sentenced to a total indeterminate term of 65 years to life, he is entitled to a youth offender parole hearing after he has served 25 years in prison. (§ 3051, subd. (b)(3).) Because Bell is entitled to a youth offender parole hearing, and thus a meaningful opportunity for release, after 25 years in prison under section 3051, we conclude that under *Franklin* his sentence was not the functional equivalent of life in prison without the possibility of parole. (*Franklin, supra*, 63 Cal.4th at pp. 268, 279-280.)

We, however, disagree with Bell's assertion that we should remand his case to the trial court for resentencing under *Contreras*. As the People note, *Contreras* is inapposite

²⁷ Section 3051, subdivision (a)(2)(B) defines a "controlling offense" as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment."

to this case because the juvenile defendants in that case were not entitled to a section 3051 youth offender parole hearing after serving 25 years in prison and therefore the sentences imposed on them for nonhomicide offenses under the One Strike law were unconstitutional under *Graham*. (*Contreras, supra*, 4 Cal.5th at pp. 356, 359.)

Furthermore, contrary to Bell's assertion, we do not believe certain language in *Contreras* (i.e., that nonhomicide juvenile offenders "must have 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' " and "the parole eligibility date of a lengthy sentence [must] offer[] a juvenile offender a realistic hope of release and a genuine opportunity to reintegrate into society") had the effect of limiting *Franklin's* holding in cases involving juvenile defendants who are entitled to youth offender parole hearings under section 3051. (*Contreras*, at p. 373.) Therefore, we reject Bell's request that we remand his case to the trial court for resentencing under *Contreras*.

XIV

Abstract of Judgment Must be Amended

Bell contends, and the People agree, that the abstract of judgment should be amended to reflect the correct total determinate sentence. In sentencing Bell, the trial court, inter alia, imposed concurrent determinate terms of three years for count 3 and 10 years for its gang enhancement for a total of 13 years and three years for count 5, 10 years for its gang enhancement, and 20 years for its gun enhancement for a total of 33

years.²⁸ However, the abstract of judgment shows the total determinate term is 36 years, not 33 years. After remand for resentencing to allow the trial court to consider whether to exercise its section 12022.53, subdivision (h) discretion to strike or dismiss any or all of the section 12022.53 gun enhancements under section 1385, the court should amend the abstract of judgment to reflect, inter alia, the correct total determinate term. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

XV

Senate Bill No. 1437

In his supplemental opening brief, Bell contends that Sen. Bill 1437, which amended sections 188 and 189 and enacted new section 1170.95 as of January 1, 2019, applies retroactively to the nonfinal judgment in his case and requires that his conviction for first degree murder be reversed and vacated and the matter be remanded to the trial court for further proceedings. In its supplemental respondent's brief, the People concede that Sen. Bill 1437 applies retroactively to the judgment in this case, but argue that we should not reverse and vacate Bell's conviction for first degree murder because newly-enacted section 1170.95 provides the exclusive procedure for obtaining retroactive relief under Sen. Bill 1437. Under that statute, Bell has the right to file a petition with the court that sentenced him to have his first degree murder conviction vacated and to be resentenced on any remaining counts when certain conditions apply. (§ 1170.95.) In his

²⁸ The court also imposed a term of 25 years to life in prison for the section 12022.53, subdivision (d) enhancement related to count 3, but stayed its execution pursuant to section 654.

supplemental reply brief, Bell argues that we have the authority to, and should, interpret and apply Sen. Bill 1437 to his appeal, regardless of the procedure allowing him to file a section 1170.95 petition for relief with the trial court. Bell contends we therefore should reverse and vacate his conviction for first degree murder and remand the matter to the juvenile court or, alternatively, to the criminal court for further proceedings. We agree with the People that if Bell believes he is entitled to relief under Sen. Bill 1437, he must first seek relief by means of a section 1170.95 petition for relief filed with the sentencing criminal court (or the juvenile court if it retains his case on remand).

A

As described by the Legislative Counsel's Digest, Sen. Bill 1437 amends sections 188 and 189, effective as of January 1, 2019, to "prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life" (Legis. Counsel's Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.).) Sen. Bill 1437 also added section 1170.95, which creates a procedure for a petition to vacate the conviction of and resentence a defendant who was prosecuted under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, sentenced for first degree murder, and could no longer be convicted of murder

because of the amendments made to sections 188 and 189 by Sen. Bill 1437. (Sen. Bill No. 1437 (2017-2018 Reg. Sess.), § 4.)

B

Bell and the People agree that Sen. Bill 1437 applies retroactively to his case, but disagree how it should be retroactively applied. Bell argues that we should reverse and vacate his first degree murder conviction and remand the matter for further proceedings. The People argue that we should not address the Sen. Bill 1437 issue in this appeal because section 1170.95 provides the exclusive procedure for a defendant to obtain retroactive relief under Sen. Bill 1437. Under that procedure, the defendant may file a petition for resentencing with the sentencing court for his or her murder conviction to be reversed and vacated and to be resentenced. (§ 1170.95.) Given their disagreement regarding how Sen. Bill 1437 applies retroactively, we must address whether Sen. Bill 1437 permits an appellate court to vacate a murder conviction in the first instance on appeal or whether a defendant must first petition for relief with the trial court under section 1170.95.

Section 1170.95 provides:

"(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second

degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

"(b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following: [¶] (A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel. [¶] (2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

"(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

"(d) (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not . . . previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause. [¶] (2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If

there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner. [¶] (3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

"(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

"(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

"(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence."

The People argue that this court does not have the authority to take any action under Sen. Bill 1437 without Bell first petitioning for relief under section 1170.95. In support of their position, the People analogize Sen. Bill 1437 to Propositions 36 and 47, both of which require defendants to follow specific petitioning procedures in the trial court to obtain relief. (See *People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*) [Proposition 36]; *People v. DeHoyos* (2018) 4 Cal.5th 594, 603-604 (*DeHoyos*) [Proposition 47].) We agree with the People. Section 1170.95 operates similarly to Proposition 36 and Proposition 47. (*People v. Anthony* (2019) 32 Cal.App.5th 1102;

People v. Martinez (2019) 31 Cal.App.5th 719.) Like Proposition 36, which enacted section 1170.126, subdivision (b), and Proposition 47, which enacted section 1170.18, subdivision (a), Sen. Bill 1437 enacted section 1170.95, setting forth an express retroactivity procedure for defendants to obtain relief under its provisions. (*Anthony*, at pp. 1148-1149; *Martinez*, at pp. 727-728; *Conley*, at pp. 658-659; *DeHoyos*, at pp. 597, 603.)

In *Conley*, the court concluded that an appellate court could not automatically resentence a defendant under Proposition 36 without that defendant first filing a petition for resentencing with the trial court under section 1170.126. (*Conley*, *supra*, 63 Cal.4th at p. 659.) *Conley* stated, "[T]o confer an automatic entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate that approved section 1170.126: to create broad access to resentencing for prisoners previously sentenced to indeterminate life terms, but subject to judicial evaluation of the impact of resentencing on public safety, based on the prisoner's criminal history, record of incarceration, and other factors." (*Ibid.*) Following *Conley*'s reasoning, *DeHoyos* similarly concluded that a defendant must follow the procedures set forth in section 1170.18 to receive the retroactive relief provided by Proposition 47. (*DeHoyos*, *supra*, 4 Cal.5th at p. 597.) *DeHoyos* stated, "[R]esentencing is available to . . . defendants *only* in accordance with the statutory resentencing procedure in . . . section 1170.18." (*Ibid.*, *italics added.*) *DeHoyos* explained its reasoning, stating:

"Like [Proposition 36], Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the

statute's benefits retroactively. [Citation.] Those provisions include, as relevant here, a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. [Citation.] And like the resentencing provision of [Proposition 36], section 1170.18 expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' [Citations.]" (*DeHoyos*, at p. 603.)

Like Proposition 36 and Proposition 47, Sen. Bill 1437 is "an ameliorative criminal law measure that is 'not silent on the question of retroactivity.' " (*DeHoyos*, *supra*, 4 Cal.5th at p. 603.) Sen. Bill 1437 enacted section 1170.95 which sets forth a procedure whereby "[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply" (§ 1170.95, subd. (a).) Also like Propositions 36 and 47, Sen. Bill 1437 does not distinguish between a defendant whose sentence is final and one whose sentence is being challenged on appeal because section 1170.95 permits both types of defendants to file petitions for relief in the trial court. (See *DeHoyos*, at p. 603.) Furthermore, like section 1170.18, which was enacted by Proposition 47, section 1170.95, which was enacted by Sen. Bill 1437, allows the trial court to vacate a defendant's conviction and resentence him or her. (§ 1170.95, subd. (d)(3).) Accordingly, because Sen. Bill 1437 provides an exclusive procedure for a defendant to obtain retroactive relief by filing with the trial court a section 1170.95 petition for resentencing, we, as an appellate court, cannot reverse and vacate Bell's

conviction for first degree murder under Sen. Bill 1437.²⁹ (Cf. *Conley*, *supra*, 63 Cal.4th at p. 658; *DeHoyos*, at p. 603.) Rather, if Bell wants to obtain retroactive relief under Sen. Bill 1437, he must first file a section 1170.95 petition for relief with the trial court.³⁰

²⁹ Furthermore, we note that if we were to decide the Sen. Bill 1437 issue on appeal without Bell first filing a section 1170.95 petition with the trial court, the prosecution and Bell would, as the People assert, be denied the opportunity to offer "new or additional evidence" in a section 1170.95 hearing in the trial court, which opportunity is provided for in section 1170.95, subdivision (d)(3).

³⁰ We express no opinion regarding the merits of any section 1170.95 petition for relief that Bell may file with the trial court in the future.

DISPOSITION

The defendant's sentence is vacated and the matter is remanded to the trial court with directions to conduct a resentencing hearing for the limited purpose of considering any section 1170.95 petition filed by defendant and exercising its discretion under section 12022.53, subdivision (h) to strike or dismiss any or all of the section 12022.53 gun enhancements, to amend the judgment accordingly, and to file an amended abstract of judgment reflecting, inter alia, the correct total determinate term. In all other respects, the judgment is affirmed. The court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

GUERRERO, J.